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October 31, 1996

Title: Murphy J. Foster, Jr., Governor of Louisiana, et al., Petitioners
v.
G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Mongrue Jr.,Roy A.

Counsel for respondent: Baker,M. Miller

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1996	G	Petition for writ of certiorari filed. (Response due November 30, 1996)
3	Oct 28 1996		Appendix of petitioner filed.
2	Nov 1 1996		Waiver of right of respondents G. Scott Love, et al. to respond filed.
4	Dec 11 1996		DISTRIBUTED. January 3, 1997 (Page 16)
5	Jan 3 1997	F	Response requested -- CJ.
6	Feb 3 1997		Brief of respondents G. Scott Love, et al. in opposition filed.
7	Feb 19 1997		REDISTRIBUTED. March 14, 1997 (Page 1)
8	Mar 17 1997		Petition GRANTED. SET FOR ARGUMENT October 6, 1997. **********
9	Apr 1 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
10	Apr 30 1997		Brief of petitioners Murphy Foster, Governor, et al. filed.
11	Apr 30 1997		Joint appendix filed.
12	Jun 2 1997		Brief of respondents G. Scott Love, P. Bergeron, K. Balhoff and B.Baker-Bourgeois filed.
13	Jul 3 1997		Reply brief of petitioners Murphy Foster, Jr., Governor, et al. filed.
14	Jul 28 1997		CIRCULATED.
15	Oct 6 1997		ARGUED.

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No. _____

In The
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTION PRESENTED FOR REVIEW

This case involves the interpretation of the Constitution and laws of the United States as they pertain to the State of Louisiana's sovereign right to provide for the election of its members to the United States Congress, and the extent, if any, to which Congress, in enacting 2 U.S.C. §§ 1 and 7, limited the authority of the states to provide for the manner of electing members to Congress. The specific question presented is whether the election system employed by the State of Louisiana to elect its members to the United States Congress conflicts with federal laws governing the time for holding congressional elections so as to render Louisiana's manner of conducting its congressional elections unenforceable under the Supremacy Clause; or whether the decision of the United States Court of Appeals for the Fifth Circuit constitutes an unnecessary and unwarranted abrogation of the authority specifically granted to the states by Article I, Section 4, Clause 1 of the United States Constitution to provide for the manner of electing members to Congress.

LIST OF PARTIES

The parties in this Court and the courts below are as follows:

Petitioners: Murphy J. Foster, Jr., in his official capacity as Governor of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, who were the defendants in the district court and appellees in the Court of Appeals.

Respondents: G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, who were the plaintiffs in the district court and the appellants in the Court of Appeals.

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In The
Supreme Court of the United States
October Term, 1996

◆

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

◆

PETITION FOR WRIT OF CERTIORARI

◆

OPINIONS BELOW

Petitioners seek a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit filed on July 30, 1996 in *G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois v. Michael J. Foster, Jr., Governor of State of Louisiana, and Fox McKeithen, Secretary of State of Louisiana*, reported at 90 F.3d 1026 (U.S. App. 5th Cir. 1996) and reprinted at Appendix A to this petition, p. App.1.

The opinion of the United States District Court for the Middle District of Louisiana in *G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois v. Edwin W. Edwards,*

Governor of State of Louisiana, and Fox McKeithen, Secretary of State of Louisiana, No. 95-788, April 11, 1996, is unreported and reprinted at Appendix B to this petition, p. App. 24. The Judgment of the District Court is reprinted at Appendix C to this petition, p. App. 25.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed herein was entered on July 30, 1996 (Appendix A, p. App. 1). Under the Rules of this Honorable Court, this Petition For Writ of Certiorari is timely filed within 90 days after the entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article I, Section 4, Clause 1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

United States Constitution, Article V, Clause 2:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

> thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

2 U.S.C. Section 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. Section 7:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Louisiana Revised Statutes 18:1272:

> § 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and

at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

Louisiana Revised Statutes 18:401:

§ 401. Purpose and nature of primary and general elections A. Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statutes 18:402 (Appendix D, p. App. 26)

Louisiana Revised Statutes 18:511 (Appendix D, p. App. 33)

STATEMENT OF THE CASE

This case involves a challenge to Louisiana's "open elections system" used for electing Louisiana's members to the United States Congress. In August 1995, the respondents, four citizens of Louisiana instituted this lawsuit against the Governor and the Secretary of State of Louisiana, to challenge the elections system that has been in place in Louisiana for nearly two decades, asserting that it conflicts with 2 U.S.C. §§ 1 and 7. Jurisdiction in the United States District Court for the Middle District of Louisiana was based on 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4).

In 1975, the Louisiana Legislature enacted Act 1 of the 1975 Regular Session, instituting Louisiana's "open elections system". By its terms, Act 1 became effective on July 1, 1975 and received the necessary preclearance from the United States Justice Department pursuant to 42 U.S.C. §1973c. The provisions of Act 1 were subsequently incorporated into the Louisiana Election Code, R.S. 18:1 et seq., by Act 697 of 1976. That act also received U.S. Justice Department preclearance. The open elections system was first employed in elections for state offices in 1976, and in the Congressional elections held in 1978. Since that time, the State of Louisiana has conducted all elections held to elect persons to Congress and to all the elective offices in this State, except the office of presidential elector, in accordance with the open elections system.

Louisiana's open elections system provides for electing United States Senators and Representatives as follows: (a) candidate qualifying is held prior to the primary election, in which all candidates regardless of party, or lack thereof, file qualification papers so as to be placed on the ballot for the primary election, R.S. 18:461; (b) if more than one candidate qualifies for a particular seat, a primary election is held on the first Saturday in October next preceding the date of the general election, in which all candidates for that congressional seat are placed on the ballot, regardless of party affiliation, or lack thereof, R.S. 18:1272; and (c) the general election is held on the first Tuesday next following the first Monday in November, in which the two top vote-getters in the primary election, regardless of party affiliation, or lack thereof, are placed on the ballot, unless the top vote-getter in the primary received a majority of the votes in the primary election, R.S. 18:1272. Louisiana's Election Code further provides that a candidate is deemed elected if he is the lone candidate to file qualification papers for

a particular seat, or if he receives a majority of the votes cast in the primary election, R.S. 18:511.

In 1872, Congress enacted legislation, 2 U.S.C. §§ 1 and 7, which provided the time for conducting elections for congress as the first Monday in November of the election year. The legislative history of the federal statutes indicates that the purpose of the federal legislation was to prevent political manipulation of the election process and to limit the number of elections held.

Respondents, G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois initiated this lawsuit challenging the validity of the Louisiana open elections system as applied to Congressional elections. They asserted that Louisiana's elections system conflicts with the provisions of 2 U.S.C. §§ 1 and 7 because in some instances, when a candidate for congress receives a majority of the votes in the primary election, no general election for that seat is held on the first Monday in November.

All parties in the litigation filed Motions for Summary Judgment, which were heard before the District Court on October 23, 1995. On April 11, 1996, the District Court denied the respondents' Motion for Summary Judgment and granted the petitioners' Motion for Summary Judgment, finding that there were no genuine issues of material fact and that the petitioners were entitled to judgment as a matter of law. The District Court stated: "The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States." Appendix B, p. App. 24.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. On July 30, 1996, a panel of the Fifth Circuit, by a 2-1 vote, reversed the decision of the District Court. The majority held that "plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." The court deferred instituting a remedy, but instead afforded the Louisiana Legislature an opportunity, until the end of the next regular legislative session in April of 1997, to enact a remedy in accordance with its decision. The matter was remanded to the District Court to reconsider plaintiffs' request for injunctive relief in the event the State does not impliment a remedy within a reasonable time after the 1997 legislative session.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the writ of certiorari sought herein to review the judgment and opinion of the appellate court because this case presents an important question of federal constitutional and statutory law decided by the appellate court that has not been, and should be settled by this Honorable Court. More specifically, the Court should grant this writ to clarify the extent to which, if any, 2 U.S.C. §§ 1 and 7 limit the authority of the states to determine the manner in which they conduct congressional elections.

ARGUMENT

The decision of the Fifth Circuit Court of Appeals misinterpreted the federal laws pertaining to congressional elections so as to find a conflict with Louisiana's elections system, and declared that "the Louisiana system as applied to federal elections must yield under the Supremacy Clause." The Su-

premacy Clause, Article V, Clause 2 of the United States Constitution, reads:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Supremacy Clause expresses a basic precept of our system of government, that the federal constitution and all laws enacted pursuant thereto override conflicting laws enacted by the states pursuant to the states' own constitutions. The matter at hand, however, does not involve simply an instance in which a state, pursuant to its constitution, enacts laws regulating the same area as that regulated by the federal government. Rather, this case involves a state exercising the authority specifically given to it by the United States Constitution, and the question of whether the state's ability to exercise that authority is limited by certain federal legislation enacted by Congress pursuant to its constitutional authority to do so.

The United States Constitution, Article I, Section 4, Clause 1 authorizes each state to prescribe the times, places and manner of holding elections for senators and representatives, subject to specific regulations enacted by Congress. " The states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299, 311, 61 S.Ct. 1031, 1035, 85 L.Ed. 1368 (1941). *See also, Krasnoff v. Hardy*, 436 F.Supp. 304 (E.D. LA, 1977). Thus, the issue is not whether federal law trumps state law, but rather whether Congress, in exercising its specific constitutional authority to regulate the

time for holding congressional elections, intended thereby also to limit the states' authority, as granted by the federal constitution, to regulate the manner of conducting its congressional elections.

The State of Louisiana, in accordance with Article I, Section 4, Clause 1, enacted its open elections system as its manner for electing its members to Congress. That system eliminated the use of multiple party primaries and subsequent general elections, and instead established a system that requires only one primary and one general election in order to elect members to Congress. In so doing, Louisiana tied its elections system to the federal laws regulating the time for holding congressional elections.

Congress enacted 2 U.S.C. §§1 and 7 pertinent to the time for holding congressional elections.

2 U.S.C. § 1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the congress commencing on the 3d day of January next thereafter.

In compliance with 2 U.S.C. §§ 1 and 7, Louisiana enacted LSA-R.S. 18:1272:

> "§ 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner one United States senator shall be elected in the year 1978, and every six years thereafter.

These federal and state statutes, when read together, give a clear indication that the State of Louisiana enacted its laws regulating the manner of conducting congressional elections so as to act in concert with the federal laws regulating the times for holding the elections. The federal statutes provide for elections on the first Tuesday following the first Monday in November. Louisiana's law mirrors the federal law, providing that the general election for Congress be conducted on the first Tuesday following the first Monday in November. The laws do not conflict; they coincide.

The appellate court decision erroneously interpreted the federal law so as to create a conflict between the federal and state legislation, by interpreting the federal legislation as requiring that the state hold contested elections on the first Tuesday following the first Monday in November. The dissenting opinion of Judge Dennis correctly and succinctly demonstrates the fallacies of the decision:

> In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.
>
> The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. *But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day.* The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections

> and the lack of any semblance of uniformity. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Appendix A, pp. App. 17-19, (citations omitted)(emphasis added).

Unlike party primaries in other states, Louisiana does not nominate candidates by parties, but instead the top two vote getters, regardless of party, can qualify for the general election. The general election is then held at the time specified by federal law, unless only one candidate qualifies for the election, either because he was the only candidate to file qualifying papers for that seat, or because he received more than 50% of the vote in the primary election. The appellate court's decision would nevertheless require that the state hold a contested election, even when only one candidate qualifies for the general election.

The appellate court's interpretation of 2 U.S.C. §§ 1 and 7 as requiring the state to hold a contested election on the date designated by the federal legislation would under its logic, require the state to recruit an additional candidate to run for a particular seat whenever only one person files qualifiying papers, and would also prevent the state from holding absentee balloting prior to the designated election date.

The appellate court decision unnecessarily intrudes on the

sovereignty of the State of Louisiana to elect its representatives and senators to Congress, by needlessly and erroneously finding a conflict between the federal and state laws, when none exists. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of (state) sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961). *Goldstein v. California*, 412 U.S. 546, 554-555, 93 S.Ct. 2303, 2309, 37 L.Ed.2d 163 (1973). Each sovereign possesses equal regulatory power as the federal government, subject only to the independent operation of the Supremacy Clause.

Given the importance of the state's right to exercise discretion in the formulation of a system of electing its representatives and senators to Congress, *United States v. Classic*, 313 U.S. 299 (1941), the appellate court's decision invalidating Louisiana's open elections system as it pertains to congressional elections constitutes a serious invasion into the sovereignty of the State of Louisiana. Review by this Court of the appellate court decision is necessary to prevent such an affront upon the right of the states to determine how to conduct their congressional elections, particularly as here, where the state and federal laws at issue can reasonably be interpreted as acting in concert, rather than in conflict.

Louisiana is entitled to exercise its sovereign power to establish the manner of electing its representatives and senators for Congress. The Constitution vests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns ..." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399 (1932); *See also, Roudebush v. Hartke*, 405

U.S. 15, 24-25, 92 S.Ct. 804, 810 (1972), and *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279 (1974).

The legislative history does not substantiate that Congress, by enacting 2 U.S.C. §§1 and 7, intended to fashion the result the appellate court decision imposes. Clearly there is no indication that Louisiana's elections system is contrary to the purposes stated by the federal legislation's proponents, i.e., prevention of manipulation of the election process by the political parties and the elimination of multiple federal elections. In fact, the concerns addressed by the members of congress in 1872 obviously arose from the party primary system in use at that time by most, if not all of the states. Louisiana's system is clearly less offensive to these articulated congressional goals then are the election systems employed by many states today, where multiple party elections are held in varying months before the general elections, and in which voters in some states may venture to the polls three, and possibly four, times to cast their ballots in congressional elections.

The appellate court's finding of a conflict between the federal statutes and Louisiana's election laws that track the very language of the federal statutes and further the purposes for which the federal statutes were enacted, requires review by this Honorable Court.

CONCLUSION

According to the United States Constitution, the manner by which a state elects its members to Congress is for the state to determine, unless and until Congress provides otherwise. The sovereign powers of the states are thereby implicated whenever a challenge is mounted to the manner proscribed by the states for holding congressional elections. The appellate court decision in this matter erroneously interpreted the federal statutory provisions pertinent to congressional elections so as to unnecessarily limit the states' authority to provide for

the manner in which states conduct their congressional elections. If sustained, the appellate court decision will greatly impact the State of Louisiana's election process and will prohibit the state from exercising its sovereign powers to determine on its own, through its own governmental processes, the method of electing its representatives to the United States Congress. This Honorable Court should grant the writ petitioned for herein and take this case on review so as to correct the erroneous decision of the appellate court and settle the important federal question of the extent, if any, the federal legislation at issue limits the authority of the states to decide the manner in which they conduct their congressional elections.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

(Filed July 30, 1996)

G. SCOTT LOVE, PAUL S. BERGERON,
KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Respondents,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF STATE OF LOUISIANA, and FOX MCKEITHEN, Secretary of State of Louisiana,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana

Before DAVIS and DENNIS, Circuit Judges, and FALLON*, District Judge.

DAVIS, Circuit Judge:

Respondents, four Louisiana voters, appeal from the district court's order granting defendants' motion for summary judgment and dismissing plaintiffs' suit seeking declaratory and injunctive relief on grounds that Louisiana's method of conducting congressional elections violates the Constitution and laws of the United States. We reverse.

*District Judge of the Eastern District of Louisiana, sitting by designation.

I.

In August 1995 four Louisiana citizens, who are registered to vote in Louisiana and who have a history of voting in congressional elections, filed this action for declaratory and injunctive relief. They seek this relief under 42 U.S.C. s 1983 and pursuant to our federal question jurisdiction to resolve a Constitutional claim. Their core allegation is that the Louisiana open primary system violates the federal statutes that establish a uniform federal election day for members of Congress and must yield under the Supremacy Clause of the Constitution. After crossmotions for summary judgment were filed, the district court granted summary judgment for the defendants. The respondents filed a timely appeal.

II.

We review a district court's grant of summary judgment de novo. *Mozeke v. International Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). In deciding this appeal, we address only the pre-emption claim. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

In *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), the Supreme Court summarized the theories under which state laws are pre-empted as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id. at 368-69, 106 S.Ct. at 1898-99 (internal citations omitted).

We start our pre-emption analysis from the bedrock premise that Congress has authority to enact the requirements for federal elections. Article I, Section 4, Clause 1 of the Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

In *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), the Court, interpreting Art. I, § 4, Cl. 1, stated that "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration,...." Id. at 366, 52 S.Ct. at 399.

In 1872, Congress established a uniform election day for elections for U.S. Representatives by enacting 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for

the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

This same election day was later adopted for elections for U.S. Senators in 2 U.S.C. § 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

Congress also set this day for the election of presidential electors. 3 U.S.C. § 1. [1]

Congress in 2 U.S.C. §§ 1, 7 therefore declared that all elections for Congress should be held on the same date, the Tuesday following the first Monday in November (federal election day). This declaration was subject to only two exceptions: (1) in states that required a majority vote for election, a runoff could be held between federal election day and January when officials take office; and (2) an election could be held on a different date if a vacancy occurred in the office. 2 U.S.C. § 8. [2] In

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[1] 3 U.S.C.§1 states:
The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

[2] 2 U.S.C. § 8 states:
The time for holding elections in any State, District, or Territory

adopting this scheme, Congress precluded a state from holding an election in which members of Congress could be elected before the federal election date.

This interpretation is supported by the legislative history. This history indicates that Congress wanted a uniform election day to prevent earlier elections in some states unduly influencing the later voters, to prevent fraudulent voting in multiple state elections, and to remove the burden of voting in more than one federal election in a given year. Cong.Globe, 42d Cong., 2d Sess. 112 (1871). [3]

The legislative history of 2 U.S.C. § 8 also supports the conclusion that Congress intended any outcome determinative election to be held on federal election day unless it fell within

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for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

[3] Mr. Butler who introduced the amendment stated the following reasons:

> But on account of the facility for colonization and repeating among the large central States, New York holding its election in November, and Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. I think it will be fair for everybody that on the day when one votes all should vote, and that the whole question should be decided then. Again, there is another and a different question. Every fourth year many of the States have

the exception in § 8. During the consideration of § 8, Senator Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect*. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a vacancy, and *still more seldom that there is a failure to elect*. In all those States in which a plurality elects, no such thing as failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot. . . .

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to hold two elections: one for the State on one day, and one for the electors of President and Vice President on another day. This throws a great burden needlessly and uselessly, it seems to me, upon the people, and I move this for the purpose of having a uniform election to take place in the future at a time when all the State constitutions as to State elections may be conformed to it.

Cong.Globe, 42d Cong., 2d Sess. 112 (1871).

On a different day, Mr. Butler reintroduced this amendment and stated:

> Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some States undue advantage. It gives some parties undue advantage.... But what I contend is that is an undue advantage, that it is a wrong, and it is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work, to say nothing of the expenses which fall on the politicians, and are of no very great consequence one way or the other.

Cong.Globe, 42d Cong., 2d Sess. 141 (1871).

> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number.* Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

Cong.Globe, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

For all of the above reasons, we conclude that Congress intended that all determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8.

We turn next to the Louisiana election scheme which respondents contend conflicts with 2 U.S.C. §§1, 7. Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes. The pre-1978 Louisiana law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. *See* La.Rev.Stat. s 18:546 (now repealed).

In 1978, Louisiana drastically changed its method for selecting federal and state officials by adopting an open primary system. Under this system, all candidates, regardless of party

affiliation, appear on the same ballot and all voters regardless of party affiliation may vote for the candidate of their choice. La.Rev.Stat. § 18:401(B). [4]

This open primary is ordinarily [5] held "on the first Saturday in October next preceding the date of the general election." La.Rev.Stat. § 18:1272(A). [6] *See also* La.Rev.Stat. § 18:1272(B). To win in the October primary, a candidate must receive a majority of the votes cast. Louisiana holds its general election on the federal election day. *Id.* But the names of congressional candidates (like candidates for statewide office) only appear on the general election ballot if no single candidate receives a majority of the votes in the primary and a runoff between the two top candidates is required. La.Rev.Stat. § 18:1271. [7]

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[4] La.R.S. s 18:401(B) states:
B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

[5] The primary is scheduled for September 21 this year because October 5 is a religious holiday.

[6] La.R.S. § 18:1272(A) states:
A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

[7] La.R.S. § 18:1271 states:
Except as otherwise provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

Thus the Louisiana open primary system allows contested elections for Congress to be decided in the primary, which is held at least one month before the general election. This is the portion of the Louisiana election scheme that respondents contend is in conflict with 2 U.S.C. §§ 1, 7. The Louisiana election code provides that: "A candidate who receives a majority of the votes cast for an office in a primary election is elected." La.Rev.Stat. § 18:511(A). When the seat in Congress is filled in the October primary, no candidate's name appears on the ballot in the November general election and no vote for that office can be cast on the federal election date. In fact, since 1978 over 80% of the contested congressional elections have been decided in the October primary. Only nine of fifty-seven contested elections for U.S. Representatives and one of six contested elections for U.S. Senator had candidates placed on the general election ballot for November.

Respondents argue that the 2 U.S.C. §§ 1, 7 sets the earliest day that a state may hold a contested election for Congress where the winner may be determined. Respondents contend that the Louisiana election system conflicts with this provision by allowing such an election at an earlier date.

Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a] candidate who receives a majority of the votes cast for an office in a primary election *is elected*." La.R.S. § 18:511(A) (emphasis added).

We agree with respondents that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters. Thus, the Louisiana system as applied to federal elections must yield under the Supremacy Clause.

III.

[4] Having decided that the Louisiana open primary election scheme conflicts with 2 U.S.C. §§ 1, 7, we now turn to a consideration of the appropriate remedy.

Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law. See *Frost v. Corporation Common*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). This drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago.

In exercising our discretion in granting or withholding an injunction we balance "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944).

Courts should be particularly loathe to preempt a state legislative task such as establishing an election scheme. Even in reapportionment cases where the voters' Fourteenth Amendment rights to equal protection is infringed, federal courts frequently give the state an opportunity to remedy the defect before fashioning a judicial remedy. *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir.1991);

Mississippi State Chapter, Operation Push, Inc., v. Mabus, 932 F.2d 400 (5th Cir.1991).

In addition to this federalism concern, a number of additional factors weigh against the issuance of an injunction: (1) The campaign for statewide and federal offices for the September 21 open primary election is well underway. Qualification date for candidates for those offices closed on Friday, July 12, 1996. Enjoining that election would be expensive for the candidates and the State. Ordering another election at a different time would also be confusing to the voters. (2) By contrast, the injury to the plaintiffs will be relatively minimal. To be assured of participating in the election of their representatives and senators, plaintiffs must vote on September 21. But they have the right to vote in those elections on that date and if they do so, their vote will count. If plaintiffs' representatives and senators are elected on September 21, they will be required to return to the polls on November 5 to vote in the presidential election. However, compared with the cost of enjoining the September 21 election, two trips to the polls is a relatively minor cost.

CONCLUSION

For the reasons discussed above, we conclude that plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. ss 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day. The next scheduled session of the Louisiana legislature is in May 1997. We remand this case to the district court with directions to reconsider plaintiffs' request for injunctive relief if the state has not acted to resolve the conflict within a reasonable time after the 1997 legislative

session. We also remand all remaining issues in this case to the district court. [8]

REVERSED and RENDERED.

DENNIS, Circuit Judge, dissenting:

Article I, Section 4, Clause 1 of the United States Constitution establishes the power and the duty of each state legislature to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to the power of the Congress to "at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Thus, except to the extent that Congress acts to change or supplement state laws, the States retain broad authority to regulate elections under the Times, Places and Manner Clause. It cannot be doubted that the Clause invests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[ ]." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795 (1932).

> This view is confirmed by the second clause of article 1, § 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single

[8] We decide this case under our federal question jurisdiction to resolve a claim under the Supremacy Clause. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983). The issues not considered in this opinion include whether plaintiffs have stated a claim for a violation of the Privileges and Immunities Clause of the Fourteenth Amendment and whether plaintiffs have stated a claim enforceable under 42 U.S.C. § 1983.

> exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It "has a general supervisory power over the whole subject." [Citations omitted.] But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making "such regulations"; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.

Id. at 366-367, 52 S.Ct. at 399. *See also, Roudebush v. Hartke*, 405 U.S. 15, 24-25, 92 S.Ct. 804, 810-11, 31 L.Ed.2d 1 (1972); ("Unless Congress Acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections."); *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) ("[ ] Art I, § 4, cl 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' "); *United States v. Classic*, 313 U.S. 299, 311, 61 S.Ct. 1031, 1035-36, 85 L.Ed. 1368 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.")

Congress, in deference and respect to the states, has been slow to exercise the powers expressly conferred upon it in relation to elections by the fourth section of the first article of the Constitution. See, "The Ku-Klux Cases." *Ex Parte Yarbrough et al.*, 110 U.S. 651, 660-662, 4 S.Ct. 152, 156- 58, 28 L.Ed. 274

(1884). It was not until 1842 that Congress took any action under the Times, Places and Manner Clause by providing that each member of Congress should be elected by a separate district, composed of contiguous territory. 5 St. 491. *Id.* Thirty years afterwards, in an act to apportion representatives to Congress among the several states according to the ninth census, Congress provided for the first time a regulation for the time of holding elections of representatives. The Act of Feb. 2, 1872, ch. 11. §§ 3 and 4, 17 Stat 28, 29, in pertinent parts, provides:

> Sec. 3. That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is hereby fixed and established as the day for the election, in each of said States and territories, of Representatives and delegates to the Congress commencing on the fourth day of March next thereafter.
>
> Sec. 4. That if, upon trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day here by fixed and established for such election, or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, an election shall be held to fill any vacancy caused by such failure, resignation, death, or otherwise, at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur.

In substance, the same provisions have been continued in the present federal statutes regulating the time of holding elections for Representatives. 2 U.S.C. § 7 provides that the Tuesday next after the first Monday in November, in every even numbered year, is established as the day for the election in each of the states and territories. 2 U.S.C. § 8 provides that the time for holding elections for Representative to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several states and territories respectively.

The Louisiana laws prescribing the times, places and manner of holding elections for Senators and Representatives provide for "open" primary and general elections. All qualified voters may vote for candidates in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it. La.R.S. 18:401(B). The times for the elections are fixed as follows: (a) The primary election is held on the first Saturday in October next preceding the date of the general election, La.R.S. 18:1272(A); and (b) the general election is held on the Tuesday next after the first Monday in November in every even numbered year, i.e., on the federal election day. La.R.S. 18:1272(B). The Louisiana laws also provide that a candidate who receives a majority of the votes cast in the primary election "is elected." La.R.S. 18:511(A).

The plaintiffs contend that the Louisiana election laws are unconstitutional because they (a) allow a possibility that a candidate for Representative will be elected by receiving a majority of votes in the primary election; (b) and are thus contrary

to the federal statute which requires that a Representative be elected on the federal election day, which Louisiana designates as the general election day.

The Supremacy Clause, Art. V, cl. 2 of the United States Constitution, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The United States Supreme Court has developed a doctrine of preemption for deciding when a state law or constitution, in whole or in part, is "contrary" to the United States Constitution, or a valid federal law or treaty, made in pursuance thereof, that requires the state provision to yield to the federal. The principal precepts comprising this doctrine were summarized recently by the court in *Northwest Central Pipeline Corporation v. State Corporation, Commission of Kansas*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989):

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law

> at issue conflicts with federal law, either because it is impossible to comply with both, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

Applying the preemption precepts to the Louisiana laws prescribing the times, places and manner of electing Representatives, it is clear that, under the supremacy clause, the state's laws are not contrary to the federal statutes that partially regulate the same subjects. Obviously there is no explicit statutory language signaling an intent to pre-empt, and we cannot infer an intention to occupy the entire field of election regulation because Congress has not legislated comprehensively on the subject. The plaintiffs present no argument to this effect but contend that the state law at issue conflicts with the federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the pre-

vious judicial understanding of the those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day. The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. See majority opinion p. 5, n. 3, and p. 6. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal elec-

tion day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day. [1] The plaintiffs have not supplied any statistics by which we may compare the open primary to the party primary and other systems. However, during the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence the party primary system probably resulted proportionately in even fewer actual contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Supreme Court observed:

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[1] For much of the history of the electoral party primary, Louisiana, like the rest of the South, was a one-party state in which general elections meant little. Paul Grosser, "Political Parties." LOUISIANA POLITICS; FESTIVAL IN A LABYRINTH 257 (1982). See also, *United States v. Classic*, 313 U.S. 299, 314 n. 2, 61 S.Ct. 1031, 1037 n. 2, 85 L.Ed. 1368 (1941). "Since the end of Reconstruction, the Republican party in Louisiana had served as little more than a nominal element in state politics. The domination of the Democratic party was so pervasive that victory in a Democratic primary invariably meant election." Bennett Wall, LOUISIANA: A HISTORY 2nd Ed. 362 (1990). The Republicans only fielded candidates on an "episodic" basis, and did not elect a member of Congress (after Reconstruction) until 1972. Grosser, *supra* at 257-8. During all of those decades in which many states held general elections which were often uncontested and usually mere formalities, Congress never chose to act to require the de facto determinative election to be held on federal election day.

Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under s 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.

* * *

[T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

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[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives (1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. . . .

Id. at 311, 313-314, 318-319, 61 S.Ct. at 1035-36, 1036-37, 1039.

Nevertheless, the plaintiffs concede that "[p]rior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Respondents' Brief at p. 32. Accordingly, they argue that this court should strike down the open primary law as it applies to Congressional elections and "revive Louisiana's pre-1978 election system for Congressional elections to the extent practicable because the pre-1978 election system is 'the only valid expression of the legislative intent.' Frost, 278 U.S. at 526-27, 49 S.Ct. at 239." *Id.* This concession and Congress's refusal during the past century to abolish or alter state party primary regulations casts grave doubt on Respondents' argument that it was Congress's intent by the Federal Election Day laws to insure that contested Congressional elections, or the opportunity to qualify for them, take place in every district on each federal election day. Because it is upon this erroneous interpretation of the Federal Election Day laws that respondents rely to show that the state's open election laws are contrary thereto and that it is impossible to comply with both, their argument in this respect is without merit.

Respondents and the majority find significance also in the fact that La.R.S. 18:511(A) provides that "[a] candidate who re-

ceives a majority of the votes cast for an office in a primary election is elected." Because the Federal Election Day laws do not necessarily preclude a candidate from being declared elected after receiving a majority of the votes in the open primary, I do not believe this provision is contrary to the federal law. However, if the majority concludes that this provision alone prevents the open elections laws from passing Supremacy Clause muster, it would be a simple matter for this court to enjoin such a declaration that a congressional candidate is elected until the federal election day, rather than declaring the whole law unconstitutional in its application to Congressional elections.

Nor is the state's open elections law contrary to the Federal Election Day laws because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. 2 U.S.C. § 7 was enacted, the Supreme Court has observed, "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough*, 110 U.S. 651, 661, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884). But those evils unduly benefiting certain states and political parties and unnecessarily burdening voters and politicians, Cong.Globe, 42nd Cong., 2d Sess. 141 (1871) (remarks of Senator Butler), are not perpetuated by the current state open elections laws any more, if at all, than by the previous party primary laws that respondents wish us to revive. As noted above, the legislative history indicates that the evil perceived by Congress at that time was the unbridled power of the states to independently arrange their election dates in a haphazard and pernicious manner completely untethered to a federally prescribed national election day. Although the present law does impose the burden of double elections on employed voters, so did the old party primary law

and so does virtually every other election system. The passage of time, however, "has mitigated those burdens to the extent that "the poor laboring man" no longer "loses his day's work" by going to the polls." *Id. See Busbee v. Smith*, 549 F.Supp. 494, 524 (D.D.C.1982). Improvements of registration and election laws have greatly reduced the danger of a voter crossing state lines to vote in more than one Congressional district election. The advent of polling coupled with the instantaneity of modern media coverage has largely superceded whatever effects the outcome of a congressional primary in one state may have on an election in another.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

G. SCOTT LOVE;
PAUL S. BERGERON;
KATHLEEN B. BALHOFF; AND
BENNIE BAKER-BOURGEOIS

VERSUS

EDWIN W. EDWARDS,
GOVERNOR OF LOUISIANA; AND
FOX MCKEITHEN, SECRETARY
OF STATE OF LOUISIANA

CIVIL ACTION

NUMBER 95-788

(Filed April 11, 1996)

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

Therefore:

IT IS ORDERED that the defendants' motion for summary judgment be and it is hereby **GRANTED.**

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment be and it is hereby DENIED.

Judgment shall be entered dismissing the plaintiffs' suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

s/ Frank J. Polozola

FRANK J. POLOZOLA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

G. SCOTT LOVE;
PAUL S. BERGERON;
KATHLEEN B. BALHOFF; and
BENNIE BAKER-BOURGEOIS

CIVIL ACTION

versus

NUMBER 95-788-B

EDWIN W. EDWARDS,
GOVERNOR OF LOUISIANA; and
FOX MCKEITHEN, SECRETARY
OF STATE OF LOUISIANA

(Filed April 11, 1996)

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiffs dismissing this suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

s/ Frank J. Polozola

FRANK J. POLOZOLA
United States District Judge

APPENDIX D

Louisiana Revised Statutes 18:402:

§ 402. Dates of primary and general elections

A. Gubernatorial elections. Elections for governor and officers elected at the same time as the governor shall be held every four years, beginning in 1983.

(1) Gubernatorial primary elections shall be held on the second to last Saturday in October of an election year.

(2) Gubernatorial general elections shall be held on the fourth Saturday after the second to last Saturday in October of an election year.

B. Congressional elections. Elections for members of Congress and officers elected at the same time as members of Congress shall be held every two years, beginning in 1982.

(1) Congressional primary elections shall be held on the first Saturday in October of an election year.

(2) Congressional general elections shall be held on the first Tuesday after the first Monday in November of an election year.

C. Municipal and ward elections. In all municipalities with a population of less than four hundred seventy-five thousand, elections for municipal and ward officers who are not elected at the same time as the governor or members of congress shall be held every four years.

(1) Primary elections for municipal and ward officers who are not elected at the same time as the governor or members of congress shall be held on the first Saturday in April of an election year, or on the second Tuesday in March of an election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year.

(2) General elections for municipal and ward officers who are not elected at the same time as the governor or members of Congress shall be held on the fourth Saturday after the first Saturday in April of an election year unless the primary election for such officers is held on the second Tuesday in March; in such case the general election shall be held on the third Saturday in April of an election year.

D. Parochial and municipal elections in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time. Elections for parochial and municipal officers in such a parish containing a municipality with a population of four hundred seventy-five thousand or more shall be held every four years, beginning in 1986.

(1) Primary elections for parochial and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time shall be held on the first Saturday in February of an election year.

(2) General elections for parochial and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more and in which the municipal and parochial elections are held at the same time shall be held on the fourth Saturday after the first Saturday in February of an election year.

E. Special elections to fill newly created office or vacancy in office. An election to fill a newly created office or a vacancy in an existing office, except the office of state legislator or representative in congress, shall be held on the dates fixed by the appropriate authority in the proclamation ordering a special election as follows:

(1) A special primary election shall be held on the first of the following days that is not less than twelve weeks after the date on which the proclamation calling the special primary election was issued; however, no special primary election shall be held at the same time as a gubernatorial election if the date of the gubernatorial election is less than fourteen weeks after the date on which the proclamation was issued and, in such case, the special primary election shall be held on the first of the following days after that gubernatorial election:

(a) The second to last Saturday in October, when the special general election is held on the fourth Saturday after the second to last Saturday in October.

(b) The first Saturday in October, when the special general election is held on the first Tuesday after the first Monday in November.

(c) The first Saturday in April, when the special general election is held on the fourth Saturday after the first Saturday in April or on the second Tuesday in March during the presidential election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year; however, commencing in 1986 and every fourth year thereafter, this date shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(d) The third Saturday in October, when the special general election is held on the fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(e)(i) The first Saturday in February of an election year for parish and municipal officers in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(ii) The first Saturday in February of 1995, except in parishes and municipalities where an election on bonds, taxes, and other propositions or questions has been called and held in January of 1995. Notwithstanding the provisions contained in R.S. 18:467 and 468, the qualifying period for primary elections held on the first Saturday in February of 1995 shall open on the third Monday in December of 1994 and shall close at 5:00 p.m. on the Wednesday following the third Monday in December of 1994.

(2) A special general election shall be held on one of the following days:

(a) The fourth Saturday after the second to last Saturday in October of 1983 and every fourth year thereafter.

(b) The first Tuesday after the first Monday in November of even-numbered years.

(c) The fourth Saturday after the first Saturday in April of any year unless the primary election is held on the second Tuesday in March; in such case the general election shall be held on the third Saturday in April; however commencing in 1986 and every fourth year thereafter, this date shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(d) The fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(e)(i) The fourth Saturday after the first Saturday in February in a parish containing a municipality with a population of four hundred seventy-five thousand or more, when the special primary election in such parish and municipality is held on the first Saturday in February of an election year for parish and municipal officers.

(ii) The fourth Saturday after the first Saturday in February

of 1995, when the special primary election is held as authorized in R.S. 18:402(E)(1)(e)(ii) on the first Saturday in February of 1995.

(3) The secretary of state shall not include the name of any candidate on any ballot for a special election to fill a vacancy in any office to which this Subsection is applicable unless such special election has been called in accordance with the provisions of this Subsection and scheduled on one of the dates provided herein. Any elector who is eligible to vote in any such special election may apply for injunctive relief to prohibit the placing of the name of any candidate in an improperly called election on the ballot. Venue for such application shall be in any parish in which the election is called, and the secretary of state shall be the proper party defendant.

F. Bond, tax, or other elections. Every bond, tax, or other election at which a proposition or question is to be submitted to the voters shall be held only on one of the following dates:

(1) The second to last Saturday in October or the fourth Saturday after the second to last Saturday in October of 1983 and every fourth year thereafter.

(2) The first Saturday in October or the first Tuesday after the first Monday in November of even-numbered years.

(3) The first Saturday in April or the fourth Saturday after the first Saturday in April of any year or on the second Tuesday in March or third Saturday in April during the presidential election year, if the statewide presidential preference primary election is scheduled on the second Tuesday in March of the presidential election year; however, commencing in 1994 and every fourth year thereafter, the first Saturday in April shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(4) The third Saturday in October or the fourth Saturday after the third Saturday in October of 1985 and every fourth year thereafter.

(5) The third Saturday in January of any year, the third Saturday in July of any year which dates, in addition to the other dates provided for in this Subsection, shall be exclusively for elections on bonds, taxes, and other propositions or questions and for no other kind of election; however, commencing in 1994 and every fourth year thereafter, the third Saturday in January shall not be applicable in a parish containing a municipality with a population of four hundred seventy-five thousand or more.

(6) For a parish containing a municipality with a population of four hundred seventy-five thousand or more, the first Saturday in February or the fourth Saturday after the first Saturday in February in 1986 and every fourth year thereafter.

(7) In case of an emergency, upon application to and approval by the State Bond Commission by two-thirds vote of its total membership, and with approval of the governor, the governing authority of a parish, of a municipality, or of a parish or city school board may conduct a bond or tax election on a Saturday which is not provided for in this Subsection.

G. Prohibited days. No election of any kind shall be held in this state on any of the days of Rosh Hashanah, Yom Kippur, Sukkoth, Shmini Atzereth, Simchas Torah, the first two days and the last two days of Passover, Shavuoth, Fast of AV, or the three days preceding Easter. If the date of any election falls on any of the above named days, the election shall be held on the same weekday of the preceding week.

Louisiana Revised Statutes 18:511:

§511. Election of candidates in a primary election

A. Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election is elected. If there are two or more offices of the same character to be filled, the number of votes necessary to constitute a majority shall be greater than the result obtained by dividing the total votes cast for all of the candidates by the number of offices to be filled and dividing the result so obtained by two. If more candidates receive a majority than there are offices to be filled, those of such candidates receiving the highest total of votes shall be elected, to the number required to fill all of the offices. Any votes received by a withdrawn candidate or a deceased candidate shall be void and shall not be counted for any purpose whatsoever.

B. Election of unopposed candidates for public office. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

C. Election of unopposed candidates for membership on party committees. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for membership on a political party committee does not exceed the number of members to be elected to the committee, the candidates for membership on that political party committee, or those remaining after the death or withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

D. Effect of a tie vote. If, as a result of a tie vote in a primary election, the number of candidates who would be elected to an office exceeds the number of persons to be elected to the office, the candidates who received the same majority of the votes cast in the primary election are not elected, but they are qualified as candidates in the general election.

Supreme Court, U.S.
FILED
OCT 28 1996

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No. 96-670

In The

Supreme Court of the United States

October Term, 1996

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 96-30429

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Appellants,

VERSUS

MICHAEL J. FOSTER, JR. GOVERNOR OF STATE OF LOUISIANA, and FOX McKEITHEN, SECRETARY OF STATE OF LOUISIANA,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

RULING ON PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC
(Filed November 15, 1996)

Before DAVIS, DENNIS and FALLON[1], District Judge.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. Judge Dennis would grant rehearing for reasons stated in his dissent. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, the Petition for Rehearing En Banc is DENIED.

In response to the petition for rehearing, we make it clear that all we hold is that Louisiana's election plan, to the extent

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1. District Judge of the Eastern District of Louisiana, sitting by designation.

it precludes any legal election for United States Representatives and Senators on Federal Election Day, conflicts with 2 U.S.C. §§1 and, 7 and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on Federal Election Day and provide for a runoff election between November and January when the elected member of Congress takes office. *See* 2 U.S.C. § 8.

DENNIS, Circuit Judge, with whom POLITZ, Chief Judge and SMITH, Circuit Judge join, dissenting from failure to grant rehearing en banc.

I respectfully dissent from the court's failure to grant rehearing en banc because (1) the panel majority erroneously declared a state statute preempted by a federal law due to its failure to correctly apply the controlling Supreme Court precedents regarding federal preemption; and, (2), even as supplemented by per curiam, the panel opinion should be clarified and limited because it casts doubt on the constitutionality of all other state primary election systems.

1. The state statute should be upheld under a correct preemption analysis. The consideration of whether a state law is contrary to the Constitution or a federal law and must, therefore, yield under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (citation omitted) ("'[T]he historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'"). Accordingly, the party claiming preemption has the burden of proof, *see* 2 Rotunda & Nowak, *Treatise on Constitutional Law* § 12.4 at 90 (2d ed. 1992), and must persuade the court that preemption is proper in one of several ways.

"First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 496 U. S . 72, 78 - 79 (1990)(citations omitted).

"Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject' . . . . [However], '[w]here . . . the field which Congress is said to have preempted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be '"clear and manifest."'" *Id.* at 79.

"Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption [1] where it is impossible for a private party to comply with both state and federal requirements, or [2] where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

The plaintiffs, G. Scott Love and others, failed to overcome the presumption that "Congress did not intend to displace state law[,] " *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) . Nor did they carry their burden of proof to show that preemption is proper in one of the prescribed ways.

The plaintiffs correctly, although tacitly, conceded that Congress did not insert specific preemptive language into the federal election day law that explicitly preempted Louisiana's power to regulate Congressional elections. Nor did they base

their argument on a field preemption rationale. Moreover, it is evident there was no "clear and manifest" intent on the part of Congress to displace the states' historic function of conducting and regulating Congressional elections. As the Supreme Court in *Storer v. Brown*, 415 U.S. 724, 729-730 (1974) recognized:

> [U]nder our Constitution . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art I, §2, cl 1. Also Art I, § 4, cl 1, authorizes the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Furthermore, the plaintiffs did not contend, and the panel majority did not decide, that the state election law actually conflicts with the federal election day law for the first reason that a state law can be conflict-preempted; i.e., that it is impossible for a private party to comply with both state and federal requirements. The federal election day law applies to the states, not individuals, and therefore places no requirements upon private parties that might conflict with regulation of their conduct by the state.[1]

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1. Two cases in which that conflict theory was argued but rejected further demonstrate its irrelevance here. In *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963), the case usually cited for the first conflict-preemption rule, the Supreme Court observed that "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." In that case, the Supreme Court concluded that no federal-state law conflict existed where federal marketing orders forbidding the picking and shipping of South Florida avocados before a certain date do not render invalid, on the ground of impossibility of dual compliance, a California statute prohibiting the sale of avocados containing less than 8 percent of oil, by weight, excluding the skin and seed, where Florida avocados marketed in California attain or exceed 8 percent when in prime commercial marketing condition, and Florida growers may avoid rejection of their avocados in California by leaving them on the trees beyond the earliest picking date set by the federal orders. Thus, the Court concluded that the present record demonstrated no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards. *Id.* at 142-143. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238(1984), the Supreme Court held that a state law authorizing award of punitive damages was not pre-empted by the Atomic Energy Act. The Court concluded that the award of punitive damages did not conflict with the federal remedial scheme under which the NRC is authorized to impose civil penalties on licensees for violation of federal standards because paying both federal fines and state-imposed punitive damages for the same incident is not physically impossible and exposure to punitive damages does not frustrate any purpose of the federal remedial scheme.

The issue of preemption under the Supremacy Clause is narrowed then to this: Does the state statute "actually conflict" with federal law because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"?

It is not disputed that the main purpose of the federal law, as clearly demonstrated by its text and legislative history, is to establish the federal election day to restrict the states' original powers to conduct Congressional elections in different, dispersed months of the year. Congress feared that, without a federally prescribed benchmark, there could be undue influence upon election results by states' strategic timing of elections

and unscrupulous individuals "throwing voters" from one state to another; and that voters would be burdened with double elections in Presidential election years.

The plaintiffs concede that the traditional partisan state primary systems, such as Louisiana's pre-1978 system, do not actually conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[2] They admit this even though they also acknowledge that state partisan primary systems frequently determine the outcome of congressional elections prior to the federal election day.[3] The crucial distinction between the partisan primary system and Louisiana's current open primary system for preemption purposes, they contend, however, is that while partisan primary elections may be determinative *de facto*, they are not conclusive *de jure*, because it is usually theoretically possible under such state laws for a non-primary candidate to get on

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2. "Prior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Appellants' Brief at 32; "Primary elections, partisan or otherwise, in advance of Federal Election Day ballot are permissible under the Federal Election Day Statutes so long as such 'primaries' are not conclusive *ipso jure*." *Id.* at 17.

3. "The [appellants] do not dispute that where only *one* candidate 'qualifies' for U.S. Representative or U.S. Senator in the sense of timely filing the appropriate candidacy papers and otherwise meeting the relevant age and residence requirements, that candidate is indeed "unopposed" on the Federal Election Day ballot, and the State is not required to place such candidate's name on the Federal Election Day ballot." Appellants' Reply Brief at 6.

See also United States v. Classic, 313 U.S. 299, 311 (1941): "In common with many other states Louisiana has exercised [its] discretion [under §2 of Article I of the Constitution] by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary."

the general election ballot on federal election day through nomination papers or write-in procedures. *See* Appellants' Brief at 10 and Reply Brief at 6.

The plaintiffs fail to demonstrate, however, that the Louisiana open primary law hinders the accomplishment of the purpose of the federal election day law. Certainly, they have not shown that it does so any more than Louisiana's former party primary law or other typical partisan primary systems. Neither the Louisiana open primary system nor the typical partisan primary system frustrates the federal statute's goal of controlling and containing the power of the states to independently arrange congressional elections by requiring that they be tied to a common termination date. Nor does either primary system present an obstacle to the federal objective of guarding against "throwing voters" from state to state. The open primary does not hinder, any more than the partisan primary, the federal objective of elimination of unnecessary elections and undue influence due to the timing of elections. The text and the legislative history of the federal statute do not reveal a clear congressional purpose to oust or displace state powers to enact state open primary systems or partisan primary systems that use the federal election day as the general election date. The most plausible inference from the federal law establishing the federal election day is that Congress did not contemplate that state power to enact any reasonable primary system incorporating the federal election day would be impaired.

Because the Supreme Court is "generally reluctant to infer preemption," *e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978), and cases cited therein, Congress must speak clearly and make its intention to preempt unmistakable.

Under the standard applicable here, there is no "actual conflict" unless the state law frustrates the purposes of the fed-

eral law. This criterion is not easy to meet. For example, a state law does not frustrate federal purposes merely because it provides for less competition, *La.Pub.Serv.Com. v. FCC*, 476 U.S. 355 (1986), or requires that federally licensed vessels in interstate commerce also meet local pollution standards, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), or prohibits items transported in interstate commerce that do not meet state maturity standards which are set higher than federal maturity standards. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In all these cases, the state requirements place hurdles in the way of federal regulation, but theses hurdles are not treated as improper unless the party claiming preemption proves that Congress clearly intended to preclude concurrent state and federal regulation. *See* 2 Rotunda & Nowak, *Treatise on Constitutional Law* § 12.4 at 91 (2d ed. 1992).

The Supreme Court's recent preemption cases signal that, out of respect for Federalism, the more democratic branches of the central government should be preferred to make the primary decisions limiting the power of the states to regulate concurrently with the federal government. Because Congress has the ultimate power to decide preemption cases—Congress after all can always overrule the Court on this question—Congress ought to exercise this power unambiguously and shoulder the ultimate responsibility as well. *Id.; cf. Michigan v. Long*, 463 U.S. 1032 (1983)(states should not be bound by phantom federal restrictions).

2. If not overruled, the panel decision should be limited and clarified. The panel majority evidently was not at first convinced by the plaintiffs' argument that *de facto* determiniative primary elections may stand because they do not "actually conflict" with the federal election day law, while *de jure* determinative primary elections do conflict and are therefore preempted. Instead of distinguishing between *de facto* and *de jure*

determinative primary elections, the panel held sweepingly that "Congress intended that *all* determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8." *Love v. Foster*, 90 F.3d 1026, 1030 (emphasis added). Specifically, 2 U.S.C. § 8 provides that "[t]he time for holding elections . . . for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." Under the panel majority holding, any system permitting a determinative primary election, whether *de facto* or *de jure*, before the federal election day, is preempted. According to the original panel decision, only elections by plurality vote on the federal election day or primaries held on that day, followed by run-off elections afterwards, are permissible, because all election day primary systems allow the possibility of either *de facto* or *de jure* determinative elections, both of which "actually conflict" with the federal law.

The panel majority's supplemental per curiam suggests, but does not clearly acknowledge, abandonment of its original broad holding in favor of a rationale based on the *de jure—de facto* distinction underlying the plaintiffs' argument. The per curiam states that "all we hold is that Louisiana's election plan, to the extent it precludes any *legal* election...on Federal Election Day, conflicts with..." the federal election day law. (emphasis added)

The panel majority's resolution of the case is flawed in several respects. The court is left without a single, clear justification for its decision. The panel neither clearly states its intention to jettison its original broad holding nor offers any explanation for its approval of a strictly *de jure—de facto* rationale. Consequently, the doubt that the initial opinion casts on

all pre-federal election day primary systems has not been dispelled; and the per curiam is void of any demonstration of a Congressional intent to displace either open or partisan primary systems that incorporate the federal election day. As a further result, the panel majority fails to give clear guidance to states in the framing of election laws. Although it suggests one way to devise an open primary system compatible with federal law, the two rationales the panel majority in turn embraces suggest other contradictory possibilities—on the one hand, that no pre-federal election day primaries that might result in *de facto* elections are permissible; on the other, that an open election system such as Louisiana's will pass muster if it prevents *de jure* determinative primary elections by allowing for write-in candidates and by requiring that a primary victor's name be placed on the ballot on the federal election day.

Conclusion

This case presents issues worthy of the time, attention, and efforts of the entire court, viz., whether the panel precipitiously declared state statutes preempted by federal law without following the teachings of the Supreme Court, and whether the panel decision's potential serious impact on other state primary election systems warrants further clarification and limitation. Accordingly, I respectfully dissent from the court's decision to deny reconsideration of this case.

Supreme Court, U.S.
FILED
FEB 3 1997
CLERK

No. 96-670

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

MURPHY J. FOSTER, JR. in his official capacity as Governor of Louisiana and W. FOX McKEITHEN, in his official capacity as Secretary of State of Louisiana

Petitioners,

v.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals for the Fifth Circuit

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COUNTER-QUESTION PRESENTED

Whether Louisiana Revised Statutes §§18:511(A), 18:1272(A), and 18:402(B)(1), which in combination permit congressional elections to occur on the first Saturday of October of an election year, violate 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the first Monday in November" of an election year.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by Petitioners, Respondents direct the Court's attention to 2 U.S.C. § 8, which provides:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

COUNTER-STATEMENT OF THE CASE

This case involves a challenge to the *timing* of Louisiana's congressional open primary, which permits conclusive congressional elections on the first Saturday in October of election years. The Respondents commenced this action for declaratory and injunctive relief under 42 U.S.C. § 1983 on August 8, 1995 in the United States District Court for the Middle District of Louisiana.

The parties promptly filed cross-motions for summary judgment, and the Respondents also moved for expedited consideration of the matter pursuant to FED. R. CIV. P. 57. The district court granted the motion for expedited consideration, and heard argument on October 23, 1995, at which time the court took the matter under advisement.

On April 11, 1996 the district court issued a one-page "Ruling on Cross Motions for Summary Judgment." In a one-paragraph discussion of the merits, the ruling stated:

> This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws

> and Constitution of the United States.

Petitioners' Appendix B, p. App. 24.

The same day the district court entered a separate final judgment in Petitioners' favor.

On April 24, 1996, Respondents filed their notice of appeal in the district court. On April 25, 1996, Respondents filed an emergency motion for expedited appeal, which the court of appeals granted on April 26, 1996. Under the expedited briefing and argument schedule, argument in the court of appeals was held on July 8, 1996.

On July 30, 1996, a divided panel of the court of appeals reversed the district court and issued a declaratory judgment "that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." *Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996); Petitioners' Appendix A, p. App. 11. The court of appeals, declined, however, to award any immediate injunctive relief because of the disruptive effect such an injunction would have had on Louisiana's then-impending 1996 congressional elections, and remanded the case to the district court with instructions to consider injunctive relief if the Louisiana Legislature did not act to correct the problem in its 1997 session. *Id.* at 1031-32; Petitioners' Appendix A, pp. App. 11-12.

On August 13, 1996, Petitioners filed a suggestion for rehearing en banc in the court of appeals. Under 5TH CIR. R. 35.6 (Internal Operating Procedure accompanying Rule), a suggestion for rehearing en banc is also treated as a petition for panel rehearing.

On October 28, 1996, Petitioners filed a petition for writ of certiorari in this Court.

On November 15, 1996, the court of appeals denied Petitioners' suggestion for rehearing en banc and petition for panel rehearing, with three members of the full court dissenting from the denial of rehearing en banc. *Love v. Foster*, 100 F.3d 413 (5th Cir. 1996) (per curiam); Petitioners' Supplemental Appendix. In response to the petition for panel rehearing, the panel stated that

> all we hold is that Louisiana's election plan, to the extent that it precludes any legal election for United States Representatives and Senators on Federal Election Day, conflicts with 2 U.S.C. §§ 1 and 7, and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on Federal Election Day and provide for a runoff election between November and January when the elected

member of Congress takes office. *See* 2 U.S.C. § 8.

Id. at 413-14; Petitioners' Supplemental Appendix, pp. 1-2.

REASONS FOR DENYING THE WRIT

Contrary to Petitioners' assertions, this case is not about Louisiana's authority to determine the *manner* in which it conducts its congressional elections. This case is about the *timing* of Louisiana's congressional open primary, and specifically, whether such primary, as a potentially *conclusive* congressional election, can, consistent with federal law, be held on the first Saturday in October as opposed to the "Tuesday next after the first Monday in November" specified by 2 U.S.C. §§ 1, 7 ("federal election day"). This Court should deny the writ because (1) whether Louisiana holds its congressional primary in November (as opposed to October) is not an important question of federal law worthy of this Court's attention, and (2) the Louisiana statutes in question plainly conflict with the relevant federal law.

In combination, La. R.S. §§ 18:511(A), 18:402(B)(1), and 18:1272(A) permit conclusive congressional elections on the first Saturday in October whenever a candidate receives a majority of

the votes cast in the congressional open primary.[1] On their face, these statutes conflict with the clear, unambiguous language of 2 U.S.C. §§1 and 7, which require that congressional elections be held on federal election day in November. The court of appeals correctly entered a declaratory judgment in favor of Respondents.

As the court of appeals panel made perfectly clear in its denial of the petition for panel rehearing, Louisiana may retain its present "open primary" system for congressional elections, so long as the Louisiana Legislature adjusts the dates so that the open primary, as a potentially conclusive congressional election, is held on federal election day in November (as required by 2 U.S.C. §§ 1 and 7) and any required run-off election (necessitated by a "failure to elect" on federal election day when no candidate obtains a majority of the votes cast) is held thereafter, as permitted by 2 U.S.C. § 8. *See Public Citizen v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993) (upholding post-federal election day U. S. Senate run-off election necessitated by a "failure to elect" on federal election day).

There is no suggestion by Petitioners, nor could there be, that the court of appeals' decision below conflicts with the decision of any state court of last resort or any other federal appeals court, that the

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[1] In the event that no candidate receives a majority of the votes cast in the congressional primary, a run-off election between the top two vote-getter is held on federal election day. La. R.S. § 18:1271.

decision below conflicts with the relevant decisions of this Court, or that the decision below so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* SUP. CT. R. 10 (outlining considerations governing review on certiorari). Petitioner's only proffered basis for this Court's exercise of its certiorari jurisdiction is that the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

Respondents respectfully submit that whether Louisiana holds its congressional primary on federal election day in November (as required by the decision below, if Louisiana is to maintain its open primary system), as opposed to the first Saturday in October (as prescribed by existing Louisiana law), is not an important issue of federal law worthy of this Court's time and attention. At issue is simply the *time* at which Louisiana holds its congressional open primary. No other state is affected by the decision below because, to Respondents' knowledge, no other state permits conclusive congressional elections prior to federal election day.

In any event, Louisiana's election system plainly conflicts with federal law, and therefore must yield under the Supremacy Clause. Because the merits are so clear, this Court need not exercise its certiorari jurisdiction.

CONCLUSION

For the reasons provided above, Respondents request that the Writ be denied.

Dated: February 3, 1997

Respectfully submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 96-670

In The
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., In His Official Capacity as Governor of Louisiana, and W. FOX McKEITHEN, In His Official Capacity as Secretary of State of Louisiana

Petitioners

vs.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS, MURPHY J. FOSTER, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF LOUISIANA, ET AL.

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QUESTION PRESENTED

This case involves an interpretation of the Constitution and laws of the United States as they pertain to the State of Louisiana's sovereign right to provide for the election of its members to the United States Congress and the extent, if any, to which Congress, in enacting 2 U.S.C. §§ 1 and 7, limited the authority of the States to provide for the manner of electing members to Congress. The specific question presented is whether the election system employed by the State of Louisiana to elect its members to the United States Congress conflicts with federal laws governing the time for holding congressional elections so as to render Louisiana's manner of conducting its congressional elections unenforceable under the Supremacy Clause; or whether the decision of the United States Court of Appeals for the Fifth Circuit constitutes an unnecessary and unwarranted abrogation of the authority specifically granted to the states by Article I, Section 4, Clause 1 of the United States Constitution to provide for the manner of electing members to Congress.

Actual parties to the proceeding in the United States District Court for the Middle District of Louisiana were:

(1) G. Scott Love, respondent herein,
(2) Paul S. Bergeron, respondent herein,
(3) Kathleen B. Balhoff, respondent herein,
(4) Bennie Baker-Bourgeois, respondent herein,
(5) Edwin W. Edwards, in his official capacity as Governor of the State of Louisiana,
(6) W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, petitioner herein.

Actual parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

(1) G. Scott Love, respondent herein,
(2) Paul S. Bergeron, respondent herein,
(3) Kathleen B. Balhoff, respondent herein,
(4) Bennie Baker-Bourgeois, respondent herein,
(5) Murphy J. Foster, Jr, in his official capacity as Governor of the State of Louisiana, petitioner herein,
(6) W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, petitioner herein.

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No. 96-670

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In The

Supreme Court of the United States

October Term, 1996

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MURPHY J. FOSTER, JR., In His Official Capacity as Governor of Louisiana, and W. FOX McKEITHEN, In His Official Capacity as Secretary of State of Louisiana

Petitioners

vs.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

◆

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

◆

BRIEF OF PETITIONERS, MURPHY J. FOSTER, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF LOUISIANA, ET AL.

◆

Murphy J. Foster, Jr., in his official capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of State of the State of Louisiana seek review of the decision of the United States Court of Appeals for the Fifth Circuit which declared that Louisiana's procedure for holding elections of its members to the United States Senate and House of Representatives, was in conflict with 2 U.S.C. §§1 and 7.

OPINIONS BELOW

The United States District Court for the Middle District of Louisiana's April 11, 1996 Ruling on Cross Motions for Summary Judgment, which denied the respondents' motion for summary judgment, granted the petitioners' motion for summary judgment and dismissed the respondents' suit for declaratory and injunctive relief, is unreported and appears in the Joint Appendix, J.A. 48. The U.S. Court of Appeals for the Fifth Circuit's July 30, 1996 opinion reversing the district court decision and thereby granting the respondents' claim for declaratory relief, is reported at 90 F.3d 1026 (5th Cir. 1996), and appears at J.A. 50. The Court of Appeals' opinion denying the petitioners' suggestion for rehearing is reported at 100 F.3d 413 (5th Cir. 1996) and appears at J.A. 73.

JURISDICTION

The decision of the U.S. Court of Appeals for the Fifth Circuit reversing the decision of the district court was entered on July 30, 1996. Petitioners filed their petition for Writ of Certiorari on October 28, 1996, within 90 days of July 30, 1996. This Court noted probable jurisdiction on March 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article I, Section 4, Clause 1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

United States Constitution, Article V, Clause 2:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

2 U.S.C. Section 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. Section 7:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in

each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Louisiana Revised Statutes 18:1272:

§ 1272. United States senators, representatives in Congress; time of electing

A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

Louisiana Revised Statute 18:401:

§ 401. Purpose and nature of primary and general elections

A. *Purpose.* Primary and general elections

are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. *Nature.* All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statute 18:402 (Appendix to Writ of Certiorari, Appendix D, pp. App.26- 31.)

Louisiana Revised Statute 18:511 (Appendix to Writ of Certiorari, Appendix D, pp. App 31- 33.)

STATEMENT OF THE CASE

In 1975, the Louisiana Legislature enacted Act 1 of the 1975 Regular Session instituting Louisiana's "open elections system". By its terms, Act 1 became effective on July 1, 1975 and received the necessary preclearance from the United States Justice Department pursuant to 42 U.S.C. §1973c. The provisions of Act 1 were subsequently incorporated into the Louisiana Election Code, R.S. 18:1 et seq., by Act 697 of 1976. That act also received the necessary Justice Department preclearance. The open elections system was first employed in elections for state offices in 1976, and in the congressional elections held in 1978. Since that time, the State of Louisiana has conducted all elections held to elect persons to Congress and to all the elective offices within the State, except the office of presidential elector, in accordance with the open elections system.

Louisiana employs its open elections systems for electing its United States Senators and Representatives as follows: (a) candidate qualifying is held prior to the primary election, in which all candidates for a particular seat, regardless of party affiliation, or lack thereof, file a notice of candidacy for that seat, so as to be placed on the ballot for the primary election (R.S. 18:401; R.S. 18:461); (b) if more than one candidate qualifies for a particular seat, a primary election is held on the first Saturday in October next preceding the date of the general election, in which all candidates for that congressional seat are placed on the ballot, regardless of party affiliation, or lack thereof (R.S. 18:402; R.S. 18:1272); and (c) a general election is held on the first Tuesday next following the first Monday in November (R.S. 18:402; R.S. 18:1272), in which the two candidates who received the highest number of votes in the primary election, regardless of party affiliation, or lack thereof, are placed on the ballot (R.S. 18:481). If one of the candidates receives a majority of the votes in the primary election, however, he is deemed elected (R.S. 18:511(A)). Louisiana's Election Code further provides that a candidate is deemed elected if he is the lone candidate to file a notice of candidacy for a particular seat (R.S. 18:511(B)).

Respondents, G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois instituted this suit in the United States District Court for the Middle District of Louisiana against Louisiana's Governor and Secretary of State, challenging the validity of the Louisiana open elections system as applied to congressional elections. They asserted that Louisiana's elections system conflicts with the provisions of 2 U.S.C. §§ 1 and 7 because in some instances, when a candidate for Congress receives a majority of the votes in the primary elec-

tion, no general election for that seat is held on the first Tuesday following the first Monday in November.

All parties to the litigation filed motions for summary judgment, which were heard before the District Court on October 23, 1995. On April 11, 1996, the District Court denied the respondents' motion for summary judgment and granted the petitioners' motion for summary judgment, finding that there were no genuine issues of material fact and that the petitioners were entitled to judgment as a matter of law. The District Court stated: "The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States." J.A. 48.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. On July 30, 1996, a panel of the Fifth Circuit, by a 2-1 vote, reversed the decision of the District Court. The majority held that "plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." 90 F.3d, at 1031, J.A. 60.. The court deferred instituting a remedy, but instead afforded the Louisiana Legislature an opportunity, until the end of the next regular legislative session in 1997, to enact a remedy in accordance with its decision. The matter was remanded to the District Court to reconsider plaintiffs' request for injunctive relief in the event the State did not enact a remedy within a reasonable time after the 1997 legislative session.

Petitioners filed a suggestion for Rehearing En Banc with the United States Court of Appeals for the Fifth Cir-

cuit on August 30, 1996. The Fifth Circuit denied the petitioners' request on November 15, 1996. J.A. 73.

SUMMARY OF THE ARGUMENT

Louisiana's open elections system comports with the requirements of federal law. Article I, Section 4, Clause 1 of the United States Constitution grants the states wide discretion in formulating a system for choosing their U.S. Senators and representatives. Congress enacted 2 U.S.C. §§1 and 7 establishing the first Tuesday next after the first Monday in November as the date on which states are to hold their elections for Congress. Louisiana, in enacting R.S. 18:1272, specifically followed the requirements of the federal statutes by designating the first Tuesday following the first Monday in November as the date for conducting the state's general elections for Congress, with the primary elections to be held on the first Saturday of October preceding the date of the general elections.

The appellate court erred in finding that Louisiana's open elections system conflicts with federal law. The court misinterpreted 2 U.S.C. §§ 1 and 7 to require states to hold contested elections for Congress on the first Tuesday next after the first Monday in November, even when, according to the manner selected by a state for choosing its members to Congress, only one candidate has qualified for the election to be held on that date.

There is no indication from the statutory language or in the legislative history that Congress, in enacting 2 U.S.C. §§1 and 7, intended to limit or otherwise affect the manner in which a state chooses to conduct its congressional elections generally, or specifically to require the states to change their method of qualifying candidates

for office so as to assure that contested congressional elections will always materialize on the first Tuesday next following the first Monday in November.

Rather than beginning with the assumption that Congress did not intend to displace state law, the appellate court instead interpreted the federal statutes in such a way as to assure a conflict with the state laws at issue.

The appellate court's interpretation of the federal statutes as preempting Louisiana's open elections law unnecessarily limits the ability of Louisiana to determine the manner in which it chooses its members to Congress. The appellate court's unreasonable and unsupported interpretation of the federal statutes constitutes an unwarranted intrusion upon the sovereign rights of the state of Louisiana as granted by Article I, Section 4, Clause 1 of the United States Constitution.

ARGUMENT

I. LOUISIANA'S OPEN ELECTIONS SYSTEM COMPORTS WITH THE REQUIREMENTS OF FEDERAL LAW

The United States Constitution, Article I, Section 4, Clause 1 requires each state to prescribe the times, places and manner of holding elections for senators and representatives, subject to specific regulations enacted by Congress. "The states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299 (1941): *Krasnoff v. Hardy*, 436 F.Supp. 304 (E.D.La.1977).

The State of Louisiana, in accordance with Article I, Section 4, Clause 1, enacted its open elections system as

its manner for electing its members to Congress. That system eliminated the use of multiple party primaries and subsequent general elections, and instead established a system that requires only one primary and one general election for electing members to Congress. In so doing, Louisiana tied its elections system to the federal laws regulating the time for holding congressional elections.

Congress enacted 2 U.S.C. §§1 and 7 pertinent to the time for holding congressional elections. 2 U.S.C. §1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. §7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

In compliance with 2 U.S.C. §§ 1 and 7, Louisiana enacted LSA-R.S.18:1272:

> § 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

These federal and state statutes, when read together, give a clear indication that the State of Louisiana enacted its laws regulating the manner of conducting congressional elections so as to comply with the federal laws regulating the times for holding the elections. The federal statutes provide for elections on the first Tuesday following the first Monday in November. Louisiana's law mirrors the federal law, providing that the general election for Congress be conducted on the first Tuesday following the first Monday in November.

Prior to 1978, Louisiana elected its members to Con-

gress through an election process in which partisan primaries were held in the summer months of the election year, followed by a general election held on the first Tuesday following the first Monday in November.[1] In actual practice, the partisan primaries were usually limited to a Democratic Party first and second primary (if no one candidate received a majority of the votes in the first primary) followed by a general election in which independent and/or other party candidates, if any, would be placed on the ballot along with the Democratic Party primary winner. More often than not, the winner of the Democratic Party primary was unopposed in the general election. As noted by Judge Dennis in his dissenting opinion:

---

1. Prior to the adoption of the open elections system, Louisiana held its partisan first primaries in either late July or early August, with the second primary held six weeks later and the general election, if necessary, on the first Tuesday following the first Monday in November. See, e.g. R.S. 18:299, enacted by Act 15 of the 1966 Louisiana Legislature:

> "After January 1, 1965, in any year in which a United States Senator is to be elected at the same time that the members of the House of Representatives in the Congress of the United States are to be elected, as provided by the laws of this state, the state central committees of the parties coming under the provisions of this part shall meet on the second Friday in June preceding the congressional election and issue a call for a primary to nominate a candidate for the United States Senate. The date for the holding of said primary shall be the second Saturday following the first Monday in August after the date of the meeting of the state central committee. If a candidate fails to receive a majority of the votes cast for the office for which he was a candidate, a second primary shall be held at the same places as the first primary and said second primary shall be six weeks from the date of the first primary...."

> [D]uring the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence, the party primary system probably resulted proportionately in even fewer actual contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Court observed:
>
> > Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.

* * *

> [T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.
>
> * * *
>
> Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative.

J.A. 68-70.

Louisiana now elects its members to Congress in a manner different from other states. Louisiana has eliminated partisan primary elections, and thereby decreased to a maximum of two the number of elections potentially

held in order to elect a member to Congress. In other states, partisan primary elections are conducted prior to the date proscribed in 2 U.S.C. §§1 and 7, and the general election is then subsequently held on that date.[2] Under Louisiana's open elections system, the general election for Congress is also held on the Tuesday next following the first Monday in November, with the primary election held on the first Saturday in October prior thereto.

Congress is authorized by the Constitution to alter or change the time, place and manner the States have chosen to conduct federal elections. In enacting 2 U.S.C. §§ 1 and 7, Congress sought only to alter the time in which elections were conducted, not their manner. There is no indication that Congress attempted to preempt Louisiana from instituting the manner it has chosen for its congressional elections. The scant legislative history of the federal legislation suggests that its purpose was to limit the number of elections so as to decrease the number of trips voters must make to the polls, and to prevent the states from manipulating the timing of congressional elections for political advantage. Louisiana's open elections system satisfies both of these objectives, perhaps better than most other systems utilized throughout the country. First, under Louisiana's system the maximum trips to the polls necessary for voters to elect members to

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2. Primary elections for Congress are held at varying times by the different states. For example, in 1994 Texas held the earliest elections, with its first (partisan) primary elections on March 8th and second primary elections on April 12. Illinois also holds its primary elections in March, while numerous other states hold their primaries in May and June of the election year. *See, Federal Elections 94, Elections Results for the U.S. Senate and U.S. House of Representatives*, Federal Election Commission, 1995.

Congress is two, less than in other states that conduct first and second partisan primaries in addition to the general election (and in some states a second "general" election may be necessary where there is a "failure to elect" on the day designated by 2 U.S.C. §§1 and 7.)[3] Second, Louisiana's scheme does not allow for the manipulation of either the general or primary election dates. Louisiana's law specifically provides that the general election is held on the first Tuesday following the first Monday in November, and the primary is normally to be held on the first Saturday in October immediately prior to the general election.[4]

II. THE APPELLATE COURT ERRED IN ITS APPLICATION OF THE SUPREMACY CLAUSE DOCTRINE

This Court's jurisprudence under the Supremacy Clause has established a doctrine of preemption for deciding when a state law or constitution conflicts with the Constitution, laws or treaties of the United States, such that the state law must yield to the federal provision. In *Northwest Central Pipeline Corporation v. State Corporation,*

3. 2 U.S.C. §8 provides:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.1993), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166 (1983).

4. In accordance with R.S. 18:402(G), the 1996 primary election ordinarily held on the first Saturday in October was held two weeks earlier, on September 21, 1996, due to conflicts with religious holidays.

Commission of Kansas, 489 U.S. 493, 509 (1989), the court stated:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to preempt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

The instant appellate court ruled that, under this Court's preemption doctrine, Louisiana's election law was preempted by 2 U.S.C. §§ 1 and 7. The appellate court did not base its decision on a finding that the federal law contained explicit statutory language signaling an intent to preempt, nor did it find that Congress has legislated comprehensively in this area such as to occupy the entire field of regulation, leaving no room for the States to supplement the federal law. Rather, the appellate court stated as its reasons for finding preemption that Louisiana's law "conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters." 90 F.3d, at 1031.

In applying preemption analysis, the court should have started with the assumption that Congress did not intend to displace state law, *Maryland v. Louisiana*, 451 U.S. 725 (1981), and evaluated, in that light, whether the state law stands as an obstacle to accomplishing the objectives of Congress.

Instead, the appellate court decision erroneously interpreted the federal law so as to create a conflict between the federal and state legislation where none exists. As discussed above, Louisiana's law tracks the language of the federal statutes in establishing the "uniform federal election day" as the date for the general elections for Congress. The appellate court, however, incorrectly interpreted the federal legislation to require that a state must hold contested elections on the first Tuesday following the first Monday in November. The court's interpretation is unsupported by the legislative history, as shown by Judge Dennis in his dissent:

In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. *But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day.* The few remarks by Senators Butler and Thurman express concern over each

state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

J.A. 66-67 (citations omitted)(emphasis added).

The appellate court's own comments concerning Louisiana's pre-1978 election system also betrays its interpretation of the federal statutes. As discussed earlier, prior to 1978, Louisiana elected its members to Congress by way of partisan primary elections, followed by a general election held on the first Tuesday after the first Monday in November. Although under that system the general elections were more often than not uncontested, the appellate court concluded that the pre-1978 system complied with the federal election day statutes stating:

Before 1978, Louisiana's election system

for selection of representatives and senators complied with the federal election day statutes. The pre-1978 law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. See La. Rev.Stat. §18:546 (now repealed)

90 F.3d, at 1030. J.A. 56.

The court reached this conclusion even though the open elections system did not change the one aspect of the law that 2 U.S.C. §§1 and 7 address, the time for holding the general election. Although Congress is authorized by the Constitution to alter or change the time, place and manner the States have chosen to conduct federal elections in enacting 2 U.S.C. §§1 and 7, Congress sought only to alter the time in which elections were conducted, not their manner. Conversely, the open elections system did not change the timing of the general election for Congress. It changed the manner by which a candidate qualifies for the general election, limiting it to the two candidates who received the most votes in the primary election, unless one candidate received a majority of the vote, in which instance only that candidate would qualify for the general election, and thereby be elected.

The only practical distinction in the uncontested general election procedure under the old law, was that an unopposed candidate's name would be placed on the general election day's ballot, clearly a distinction without a difference.

Rather than attempting to interpret the state and federal laws reasonably so as to avoid a conflict, the appellate court, after first interpreting the federal statutes so as to create a conflict, then did likewise to the state law provisions. The court stated:

> Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a] candidate who receives a majority of the votes cast for an office in a primary election *is elected.*" La.R.S. §18:511(A)(emphasis in original).

90 F.3d, at 1031. J.A. 58.

The appellate court's interpretation of R.S.18:511(A) is incorrect and directly contradictory to the specific terms of R.S. 18:481[5], which specifically provide that the

5. R.S. 18:481 provides as follows:
> The candidates who qualify for each office remaining to be filled in the general election are those who received the two highest number of votes, the four highest number of votes, and so on among those not elected in the primary election, until the maximum number of candidates for each office of the general election ballot is reached.

purpose of the primary election is to qualify candidates for the general election. The sentence in R.S. 18:511(A) cited by the appellate court serves merely the function of keeping the name of an unopposed candidate off of the ballot and to acknowledge the obvious fact that an unopposed candidate is elected to office.

A similar provision appears in R.S.18:511(B) pertaining to candidates who are unopposed at the close of qualifying for the primary election. See Appendix to J.S., at App.32. It provides that when only one candidate files a notice of candidacy for a particular office, he is declared elected, and his or her name is not to appear on the ballot in either the primary or general election. Under the appellate court's reasoning, that provision of Louisiana law also conflicts with the federal laws, and suggests the absurd result that if Louisiana must hold a contested election on the first Tuesday following the first Monday in November even if only one candidate qualifies for the general election by receiving a majority of the votes cast in the primary, Louisiana must also hold a contested election on the date designated by the federal legislation, even when only one candidate files a notice of candidacy.

III. THE APPELLATE COURT DECISION IS AN UNNECESSARY AND UNWARRANTED INTRUSION UPON THE STATE'S SOVEREIGNTY

The appellate court decision unnecessarily intrudes upon the sovereign right of the State of Louisiana to de-

termine the manner in which it elects its representatives and senators to Congress, by needlessly and erroneously finding a conflict between the federal and state laws, when none actually exists. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of (state) sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961). *Goldstein v. California*, 412 U.S. 546 (1973). Each sovereign possesses equal regulatory power as the federal government, subject only to the independent operation of the Supremacy Clause.

Given the importance of the state's right to exercise discretion in the formulation of a system of electing its representatives and senators to Congress, *United States v. Classic*, 313 U.S. 299 (1941), the appellate court's decision invalidating Louisiana's open elections system as it pertains to congressional elections constitutes a serious invasion to the sovereignty of the State of Louisiana. The appellate court decision is an affront to the rights of the states to determine how to conduct their congressional elections, particularly as here, where the state and federal laws at issue can reasonably be interpreted as acting in concert, rather than in conflict.

Louisiana is entitled to exercise its sovereign power to establish the manner of electing its representatives and senators for Congress. The Constitution vests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns ..." *Smiley v. Holm*, 285 U.S. 355, 366

(1932); See also, *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972), and *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The legislative history does not substantiate that Congress, by enacting 2 U.S.C. §§1 and 7, intended to limit the states' ability to determine the manner in which they conduct their congressional elections. As discussed above, the limited goals of the federal legislation, i.e., prevention of manipulation of the election process for political purposes and the elimination of multiple federal elections, is not frustrated by operation of Louisiana's election laws. In fact, the concerns addressed by the members of Congress in 1870 obviously arose from the party primary system, utilized at that time by most states. Louisiana's system is clearly less offensive to these articulated congressional goals than are the election systems employed by many states today, where multiple party elections are held in varying months before the general elections,[6] and in which voters in some states may venture to the polls three, and possibly four times to cast their ballots in congressional elections.

The appellate court's decision, finding a conflict between the federal statutes, and Louisiana's election laws that track the very language and further the purposes of the federal statutes, requires reversal by this Honorable Court.

CONCLUSION

According to the United States Constitution, the manner by which a state elects its members to Congress is for the state to determine, unless and until Congress provides otherwise. The sovereign powers of the states are thereby implicated whenever a challenge is mounted

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6. See footnote 2, supra.

to the manner proscribed by the states for holding congressional elections. The appellate court decision in this matter erroneously interpreted the federal statutory provisions pertinent to congressional elections so as to limit the states' authority to provide for the manner in which states conduct their congressional elections. If sustained, the appellate court unnecessarily will prohibit the state of Louisiana from exercising its sovereign powers to determine on its own, through its own governmental processes, the method of electing its representatives to the United States Congress.

Respectfully submitted,

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No. 96-670

Supreme Court U.S.
FILED
APR 30 1997
CLERK

In the
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., In His Official Capacity as Governor of Louisiana, and W. FOX McKEITHEN, In His Official Capacity as Secretary of State of Louisiana

Petitioners

versus

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition For Certiorari Granted : March 17, 1997

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U. S. DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
(Baton Rouge)

Love, Et Al.

v.

Edwards, Et Al.

Filed: 08/07/95

CIVIL DOCKET FOR CASE #: 95-CV-788

8/7/95	1	COMPLAINT Filing Fee $120.00 Receipt #57419 (ph) [Entry date 08/08/95]
9/5/95	9	MOTION by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois for Summary Judgment (Motion Hearing set for 9:00 11/17/95) (ph) [Entry date 09/06/95]
9/5/95	11	MOTION by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois for Expedited hearing on motion for SJ (ph) [Entry date 09/06/95]
9/6/95	12	FIRST AMENDED COMPLAINT for declaratory relief and permanent injunctive relief (Answer due 9/18/95 for Fox McKeithen, for Edwin Edwards) by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois amending [1-1] complaint (sh) [Entry date 09/07/95]

9/14/95	13	ORDER granting [11-1] motion for Expedited Hearing, Motion Hearing set for 9:00 10/23/95 for [9-1] motion for Summary Judgment with oral argument (signed by Judge Frank J. Polo-zola), issued notices. (ph)
9/18/95	14	ANSWER to Complaint by Edwin Edwards, Fox McKeithen (Attorney Sheri M. Morris). (ph) [Entry date 09/19/95]
10/4/95	18	MOTION by Edwin Edwards, Fox McKeithen for Summary Judgment (Motion hearing set for 9:00 12/1/95) (ph) [Entry date 10/05/95]
10/4/95	20	MOTION by Edwin Edwards, Fox McKeithen for Expedited Hearing on motion for SJ (ph) [Entry date 10/05/95]
10/4/95	21	ORDER granting [20-1] motion for Expedited Hearing, Motion Hearing set for 10/23/95 for [18-1] motion for Summary Judgment (signed by Judge Frank J. Polozola), issued notices. (ph)
2/16/96	25	LETTER to FPJ/Daniel Balhoff...re: req a tele status conf...FJP advised that there is no need for conf and Dan Balhoff was advised via telephone on 2/16/96 (rg)
4/11/96	26	RULING granting [18-1] dfts' motion by for Summary judgment, denying [9-1] pltf's motion for Summary Judgment. Judgment Shall be entered dismissing the pltfs suite with prejudice. (signed by Judge Frank J. Polozola), issued notices. (hj) [Entry date 04/12/96]
4/12/96	27	JUDGMENT for dfts Edwin Edwards, Fox McKeithen against pltfs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois dismissing this

suit with prejudice. (signed by Judge Frank J. Polozola), issued notices. (hj)

4/24/96	28	NOTICE OF APPEAL, by G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, Bennie Baker-Bourgeois. Appeal record due on 5/24/96 (ph)

GENERAL DOCKET
FIFTH CIRCUIT COURT OF APPEALS

Love, Et Al.

v.

Foster, McKeithen, Et Al.

Appeal from Middle District of Louisiana, Baton Rouge

COURT OF APPEALS DOCKET#: 96-30429

4/25/96	Civil Rights case docketed. NOA filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant, Bennie Baker-Bourgeois. [96-30429] Fee due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
4/25/96	MOTION filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois to expedite appeal. [284749-] [96-30429] (jmp)
4/26/96	COURT ORDER filed granting motion to expedite appeal. [284749-] (jlw) Copies to all counsel. [96-30429] Oral argument and briefing schedule to be established by the Clerk of Court.
4/29/96	EXPEDITED BRIEFING NOTICE issued. [96-30429] A/Pet's Brief due on 5/3/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. E/Res's Brief due on 5/17/96 for Fox McKeithen, for Michael J. Foster. Reply Brief due on 5/24/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)

5/6/96	APPELLANT'S BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant, Bennie Baker-Bourgeois. Copies of brief: 7. # of pages: 34. Date of COS: 05/03/96. Sufficient [Y/N]: N Binding Insufficient. [96-30429] A/Pet's Brief ddl satisfied. Sufficient Brief due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
5/6/96	Record excerpts filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. # of copies: 4. Sufficient [Y/N]: N - No Binding. [96-30429] Sufficient Record Excerpts due on 5/6/96 for Bennie Baker-Bourgeois, for Kathleen B. Balhoff, for Paul S. Bergeron, for Scott Love. (dmd)
5/20/96	APPELLEE'S BRIEF filed by Appellee Michael J. Foster, Appellee Fox McKeithen, Copies of Brief: 7. # of pages: 19. Date of COS: 05/17/96. Sufficient [Y/N]: Y. [96-30429] E/Res's Brief ddl satisfied. (dmd)
5/24/96	CASE CALENDARED for oral argument.
5/30/96	REPLY BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. Copies of Brief: 7. # of

pages: 13. Date of COS: 05/28/96. Sufficient [Y/N]: Y. [96-30429] (dmd)

5/30/96 COURT ORDER filed denying suggestion for hearing en banc [30738-] (wed) Copies to all counsel. [96-30429] (THIS ORDER WAS ENTERED TO REFLECT THAT NO POLL WAS TAKEN IN CONJUNCTION WITH THE ORDER PREVIOUSLY ENTERED, DENYING SAME) (pok)

6/19/96 SUPPLEMENTAL LETTER BRIEF requested of Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois, Appellee Michael J. Foster, Appellee Fox McKeithen for questions from panel. A br due: 6/25/96 E br due: 7/2/96 [96-30429] (vlb)

6/25/96 SUPPLEMENTAL LETTER BRIEF filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois. Copies of Brief: 4. # of pages: 13. Date of COS: 6/25/96 [96-30429] A/Pet Supplemental Brief ddl satisfied. (vlb)

7/2/96 SUPPLEMENTAL LETTER BRIEF filed by Appellee Michael J. Foster, Appellee Fox McKeithen. Copies of Brief: 4. # of pages: Date of COS: 0702/96. [96-30429] E/Res Supplemental Brief ddl satisfied. (dmd)

7/8/96 ORAL ARGUMENT heard. Case argued by Roy A. Mongrue for Appellee Fox McKeithen, Appellee Michael J. Foster, M. Miller Baker for Appellant Bennie Baker-Bourgeois, Appellant Kathleen B. Balhoff, Appellant Paul S. Bergeron, Appellant

Scott Love [96-30429] (vlb)

7/15/96 FILING LETTER of Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois dated 7/15/96 requesting it be brought to panel's attention as soon as possible. It deals with election qualifications, etc. [96-30429] (jmp)

7/30/96 OPINION filed. Issd in T form? Y Issue Mandate due on 8/20/96. [96-30429] (dse)

7/30/96 JUDGMENT entered and filed. [96-30429] (dse)

8/12/96 SUGGESTION filed by Appellee Michael J. Foster, Appellee Fox McKeithen for hearing en banc. # of copies filed: 20. [384959-1] Issue Mandate ddl cancelled. [96-30429] (ccb)

9/10/96 RESPONSE/OPPOSITION filed by Appellant Scott Love, Appellant Paul S. Bergeron, Appellant Kathleen B. Balhoff, Appellant Bennie Baker-Bourgeois to suggestion for rehearing en banc as requested by the Court [384959-1] by Appellee Michael J. Foster, Appellee Fox McKeithen. [409138-1] [96-30429] (ksw)

11/5/96 SUPREME COURT NOTICE that petition for certiorari was filed on 10/28/96 by Appellee Michael J. Foster, Appellee Fox McKeithen. Supct. No.: 96-670. (dmd)

11/15/96 COURT ORDER filed denying suggestion for rehearing en banc [384959] With poll (Y/N)?: Y Issue Mandate due on 11/22/96. *(wed,jld,Fallon)* Copies to all counsel. [96-30429] (DENNIS, DISSENTS FROM FAILURE TO GRANT REHEAR-

ING EN BANC, WITH WHOM POLITZ AND SMITH JOINED) (rmf)

11/26/96	35	MANDATE issued. Approved BOC issued (Y/N)?: Y. [96-30429] Issue Mandate ddl satisfied. (dmd)
3/24/97	36	SUPREME COURT ORDER received granting petition certiorari [463603-1] filed by Appellee Michael J. Foster, Jr., Appellee Fox McKeithen on 3/17/97. [96-30429]. (ksw)

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

v.

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND PERMANENT INJUNCTIVE RELIEF
(Filed: 09/06/95

Plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, by counsel, as and for their First Amended Complaint against Defendants Edwin W. Edwards, Governor of Louisiana, and Fox McKeithen, Secretary of State of Louisiana, allege upon information and belief as follows:

NATURE OF THE ACTION

1. This is a federal civil rights action brought under 42 U.S.C. § 1983 against Defendants for conducting, under color of state law, regular congressional elections in Louisiana on dates earlier than the day mandated by federal law, in violation of Plaintiffs' federal statutory and constitutional rights.

2. An actual, justiciable controversy exists between the parties over Defendants' holding of regular congressional elections within the State of Louisiana on dates earlier that the day

required by federal law. Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201, 42, U.S.C. §1983, and FED. R. CIV. P. 57, and permanent injunctive relief pursuant to 28 U.S.C. § 2202, 42 U.S.C. § 1983, and FED. R. CIV. P. 65 requiring Defendants to conduct all future regular elections in Louisiana for U. S. Representative and U. S. Senator, including the impending 1996 elections, on the dates compelled by federal law.

THE PARTIES

3. Plaintiff G. Scott Love is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Love is a registered voter who resides in the Sixth Congressional District of Louisiana. Love has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

4. Plaintiff Paul S. Bergeron is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Bergeron is a registered voter who resides in the Sixth Congressional District of Louisiana. Bergeron has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

5. Plaintiff Kathleen B. Balhoff is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Balhoff is a registered voter who resides in the Sixth Congressional District of Louisiana. Balhoff has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

6. Plaintiff Bennie Baker-Bourgeois is a citizen of Louisiana

and of the United States who resides in Lafourche Parish, Louisiana. Baker-Bourgeois is a registered voter who resides in the Third Congressional District of Louisiana. Baker-Bourgeois has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices.

7. Defendant Edwin W. Edwards is Governor of the State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to Article IV, § 5 of the Louisiana Constitution, Edwards is responsible for executing the laws of Louisiana. Edwards is sued in his official capacity.

8. Defendant Fox McKeithen is Secretary of State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to LA. R.S. § 18:421, McKeithen is the chief election officer of Louisiana. Pursuant to LA. R.S. § 18:1277, McKeithen is also responsible for certifying the results of congressional elections. McKeithen is sued in his official capacity.

JURISDICTION

9. This action arises under 42 U.S.C. § 1983, 2 U.S.C. §§ 7 and 1, the Supremacy Clause of Article VI of the U.S. Constitution, and the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

10. The jurisdiction of this Court over claims arising under 2 U.S.C. §§ 7 and 1 and the U.S. Constitution is founded on 28 U.S.C. § 1331.

VENUE

12. Venue in this Court is proper under 28 U.S.C. § 1391(b).

THE CAUSE OF ACTION

Federal Law Requirements for the Timing of Congressional & Presidential Elections

13. Article I, § 4, cl. 1 of the U.S. Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

14. Acting pursuant to its constitutional authority under Article I, § 4, cl. 1, in 1872 Congress enacted 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Hereinafter, the date prescribed by 2 U.S.C. § 7 for the holding of regular elections for U.S. Representatives is referred to as "Federal Election Day."

15. Title 2, § 1 of the U.S. Code requires that in U.S. Senate election years, regular elections of U.S. Senators throughout the United States shall take place on Federal Election Day.

16. Under authority granted by Article II, § 1, cl. 4 of the U.S. Constitution, Congress has mandated in 3 U.S.C. § 1 that in Presidential election years, presidential Electors throughout the United States shall be appointed by the States on Federal Election Day.

17. Article VI, § 2 of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

18. Section 1 of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

Louisiana Law Governing the Timing of Congressional & Presidential Elections

19. LA. R.S. § 18:1272(A) provides:

> All general elections for representatives in Congress ... shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. *The primary election shall be held on the first Saturday in October next preceding the date of the general election.*

(emphasis added).

20. LA. R.S. § 18:402(B)(1) provides: *"Congressional primary elections shall be held on the first Saturday in October of an election year."* (emphasis added).

21. LA. R.S. § 18:1272(B) provides that a U.S. Senator, in the year prior to the expiration of an incumbent's term, shall be elected "at the same time and at the same polling places as representatives in Congress."

22. Regarding the election of U.S. Representatives and U.S. Senators, LA. R.S. § 18:1271 provides:

> Except as otherwise specifically provided in this Part,

> United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

23. By operation of LA. R.S. § 1271, the following provision of the Louisiana Election Code is applicable to primary elections for U.S. Representative and U.S. Senator:

> Majority vote. *A candidate who receives a majority of the votes cast for an office in a primary election is elected.*

LA. R.S. § 18:511(A) (emphasis added). Thus, should a candidate for U.S. Representative or U.S. Senator in Louisiana secure a majority of the vote in the October open primary established by LA. R.S. §§ 18:1272(A), 18:1272(B), and 18:402(B)(1), under LA. R.S. §§ 18:1271 and 18:511(A) such candidate is "elected" and no election is conducted on Federal Election Day.

24. Pursuant to authority under Article II, § 1, cl. 2 of the U.S. Constitution enabling states to choose their own method of "appointing" Presidential Electors, Louisiana has enacted LA. R.S. § 18:1251, which provides for the popular election of Presidential Electors in Presidential election years. In accordance with the Congressional command in 3 U.S.C. § 1 that Presidential Electors be appointed on Federal Election Day, LA. R.S. § 18:1251 provides in pertinent part:

> The election [of Presidential Electors] *shall be held on the Tuesday following the first Monday in November....*

(emphasis added).

25. By permitting a candidate to win outright in the October open primary by securing a majority of the vote, Louisiana conducts binding and conclusive elections for U.S. Representative and U.S. Senator on the first Saturday in October. Only when the October open primary results in a failure to elect a

candidate to such offices does Louisiana, pursuant to LA. R.S. §§ 18:481, 18:1271, 18:1271(A) and 18:1272(B), conduct a run-off election on Federal Election Day between the candidates who receive the two highest numbers of votes in the primary.

Elections for U.S. Representatives in Louisiana, 1978-1994

26. Since Louisiana's open primary first took effect in federal elections in 1978, there have been seventy regular elections for U.S. Representative in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

27. Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested, i.e., only one candidate qualified for the open primary and therefore was declared elected without a contested primary election pursuant to LA. R.S. § 18:511(B).

28. Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary and thus held on such day when one candidate received a majority of the vote and therefore was elected outright pursuant to LA. R.S. §§ 18:1272(A), 18:402(B)(1), 18:1271, and 18:511(A).

29. Only nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the Federal Election Day when a failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election pursuant to LA. R.S. §§ 18:1272(A), 18:1271, and 18:481.

30. Of the fifty-seven contested regular elections for U.S. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the Federal Election Day.

Elections for U.S. Senator in Louisiana, 1978-1994

31. Since Louisiana's open primary first took effect in federal elections in 1978, there have been six regular elections for U.S. Senator from Louisiana. These elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

32. Five of the six contested regular elections for U.S.. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus were held on such day because one candidate received a majority of the vote and therefore was elected pursuant to LA. R.S. §§ 18:1272(B), 18:1271, and 18:511(A).

33. Only one of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on the Federal Election Day when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election pursuant to LA. R.S. §§ 18:1272(B), 18:1271, and 18:481.

Past and Future Injury to Plaintiffs Resulting from Louisiana's Violation of Federal Law Requirements for Timing of Congressional Elections

34. On October 6, 1996, pursuant to LA. R.S. §§ 18:402(B)(1), 18:1271, 18:1272(A), and 18:1272(B), Defendants will conduct open primary elections in Louisiana for Representatives from each Congressional District (including the Sixth and Third Congressional Districts) and U.S. Senator.

35. Should any candidate for U.S. Representative for the Sixth or Third Congressional Districts of Louisiana or U.S. Senator in the October 6, 1996 open primary win a majority of the vote, under LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271(A), and 18:1272(B), such candidate shall be elected, and Plaintiffs will be denied their right to vote for U.S. Representative or U.S. Senator on Federal Election Day, November 5, 1996.

36. On Federal Election Day, November 5, 1996, Defendants will conduct an election for Presidential Electors in Louisiana pursuant to LA. R.S. § 18:1251.

37. The right of each Plaintiff to vote for U.S. Representative and U.S. Senator on Federal Election Day is a right secured by the Constitution and laws of the United States, and the past and future denial of that individualized right is irreparable injury per se.

38. In previous Presidential election years, Plaintiffs have been injured by the Louisiana open primary system by being burdened with the requirement of voting in federal elections on two different days. Because the open primary forecloses an election on Federal Election Day if any candidate for U.S. Representative or U.S. Senator secures a majority of the vote, Plaintiffs have been and will be forced to vote in Louisiana's open primary to ensure that they will not be denied the opportunity to vote for U.S. Representative and U.S. Senator. Plaintiffs must then return to the ballot on Federal Election Day to vote for Presidential Electors. Under LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), this irreparable injury to Plaintiffs will be repeated in 1996 and all subsequent Presidential election years.

39. As a result of Louisiana's noncompliance with the federal timing requirement for congressional elections, Plaintiffs have in the past and will in the future suffer irreparable injury by being deprived of the right to participate in the political process and advocate the defeat or election of candidates for U.S. Representative and U.S. Senator during the time period between a conclusive primary for such offices and Federal Election Day.

COUNT I - DECLARATORY RELIEF

40. Plaintiffs reallege paragraphs 1-39 as if set forth here at length.

41. Plaintiffs' rights to vote in elections for U.S. Representative and U.S. Senator on Federal Election Day are privileges or immunities of U.S. citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

42. Plaintiffs' rights to vote in elections for U.S. Representative and U.S. Senator on Federal Election Day pursuant to 2 U.S.C. §§ 7 and 1 are federal statutory rights protected by the Supremacy Clause of Article VI of the U.S. Constitution.

43. Congress enacted 2 U.S.C. §§ 7 and 1 for the benefit of all voters, including Plaintiffs.

44. By providing for the conclusive election of a candidate for U.S. Representative and U.S. Senator in the October open primary, L.A. R.S. §§ 18;402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) allow Louisiana to circumvent the holding of regular congressional elections on Federal Election Day and deny Plaintiffs their rights to vote for U.S. Representative and U.S. Senator on such date. Accordingly, LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) violate 2 U.S.C. §§ 7 and 1 and as such are unconstitutional under the Supremacy Clause of Article VI of the U.S. Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

45. By conducting elections for U.S.. Representative and U.S. Senator in Louisiana in accordance with LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), Defendants under color of state law have in the past and will in the future violate the rights secured to Plaintiffs by the Constitution and laws of the United States to vote in congressional elections on Federal Election Day. the past violations and prospective future violations of Plaintiffs' rights to vote in congressional elections on Federal Election Day create a real and

justiciable controversy susceptible of resolution by declaratory judgment.

COUNT II - PERMANENT INJUNCTION

46. Plaintiffs reallege paragraphs 1-45 as if set forth here at length.

47. By conducting elections for U.S. Representative and U.S. Senator in Louisiana in accordance with LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), Defendants under color of state law have in the past and will in the future violate the rights secured to Plaintiffs by the Constitution and laws of the United States to vote in congressional elections on Federal Election Day.

48. Plaintiffs' rights to vote for a U.S. Representative and U.S. Senator on Federal Election Day are important rights, the deprivation of which denies each plaintiff the full scope of his or her individualized right to vote for a U.S. Representative or U.S. Senator. This deprivation of each Plaintiff's right to vote on Federal Election Day constitutes injury per se for which there is no adequate remedy at law.

49. By impairing the Plaintiffs' rights to vote for a U.S. Representative or U.S. Senator on Federal Election Day whenever a congressional candidate secures a majority of the votes case in Louisiana's open primary, Defendants directly and proximately have caused and will continue to cause irreparable injury to Plaintiffs for which there is no adequate remedy at law. Among other things, in Presidential election years Plaintiffs have been in the past and will be in the future burdened with the need to vote in regular federal elections on two different days, and Plaintiffs have been in the past and will be in the future deprived of the right to participate in the political process and advocate the defeat or election of candidates for U.S. Representative and U.S. Senator during the time period between a

conclusive primary for such offices and Federal Election Day.

50. It is in the public interest that Defendants be enjoined permanently from violating Plaintiffs' rights under 2 U.S.C. §§ 7 and 1 to vote for U.S. Representative and U.S. Senator on Federal Election day, because Plaintiffs' rights to vote on Federal Election Day are protected by the Supremacy Clause of Article VI of the U.S. Constitution and Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court:

(a) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and Fed. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be an "election" within the meaning of the 2 U.S.C. §§ 7 and because such primary allows the conclusive election of U.S. Representatives and U.S. Senators;

(b) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the Plaintiffs' rights to vote for U.S. Representative and U.S. Senator in regular congressional elections on Federal Election Day under 2 U.S.C. §§ 7 and 1 to be privileges of U.S. citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution;

(c) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be unconstitutional under the Supremacy Clause of Article VI of the U.S. Constitution by providing for the regular election of U.S. Representatives and Senators on a date earlier than that permitted by 2 U.S.C. §§ 7 and 1;

(d) Declare, pursuant to 28 U.S.C. § 2201, 42 U.S.C. § 1983, and FED. R. CIV. P. 57, the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), and 18:511(A), 18:1271, 18:1272(A), and 18:1272(B) to be unconstitutional under the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution because such primary denies the Plaintiffs their privilege as U.S. citizens to vote in regular congressional elections on Federal Election Day;

(e) Enter a permanent injunction pursuant to 28 U.S.C. § 2202, 42 U.S.C. § 1983, and FED. R. CIV. P. 65 enjoining Defendants from conducting the October open primary for regular congressional elections established by LA. R.S. §§ 18:402(B)(1), 18:511(A), 18:1271, 18:1272(A), and 18:1272(B), and requiring Defendants to conduct the 1996 and all future conclusive regular elections for U.S. Representative and U.S. Senator in Louisiana on Federal Election Day as designated by 2 U.S.C. §§ 7 and 1;

(f) Grant Plaintiffs their costs of this action and reasonable attorney fees pursuant to 42 U.S.C. § 1988; and

(g) Grant Plaintiffs such other relief as the Court deems just and equitable.

DATED: September 6, 1995 Respectfully submitted,

MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY

by: /s/ Thomas E. Balhoff
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 6th day of September, 1995, that a copy of the foregoing pleading has been served by U.S. Mail, first class postage prepaid, or hand-delivery, upon the following counsel of record.

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Sheri Marcus Morris, Esquire
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/s/ Thomas E. Balhoff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, ET. AL, PLAINTIFFS

versus

EDWIN W. EDWARDS, ET. AL, DEFENDANTS.

ANSWER

NOW INTO COURT through undersigned counsel come defendants, EDWIN W. EDWARDS, in his offical capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of the State of Louisiana, who in answer to Plaintiffs' Complaint for Declaratory Relief and Permanent Injunctive Relief, as amended on September 6, 1995, asserts the following defenses.

FIRST DEFENSE

This court lacks subject matter jurisdiction.

SECOND DEFENSE

The complaint fails to state a cause of action or facts sufficient to constitute a claim upon which relief can be granted.

THIRD DEFENSE

Defendants futher answer the complaint as follows:

1. The allegations contained in paragraphs 1 and 2 are conclusions of law which do not require an answer; alternatively, the allegations are denied.

2. The allegations contained in paragraphs 3, 4, 5 and 6 are denied for lack of sufficient information to justify belief therein.

3. The allegations contained in paragraph 7 are admitted.

4. The allegations contained in paragraph 8 are admitted with the exception that W. Fox McKeithen is not a resident of East Baton Rouge Parish.

5. The allegations contained in paragraphs 9, 10, 11 and 12 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

6. The allegations contained in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

7. The allegations contained in paragraphs 24, 25 and 26 are denied.

8. The allegations contained in paragraphs 27, 28, 29 and 30 are conclusions of law and do not require an answer; alternatively, the allegations are denied for lack of sufficient information to justify a belief therein.

9. The allegations contained in paragraph 31 are denied for lack of sufficient information to justify a belief therein.

10. The allegations contained in paragraphs 32 and 33 are conclusions of law and do not require an answer; alternatively, the allegations are denied for lack of sufficient information to justify a belief therein.

11. The allegations contained in paragraph 34 are admitted.

12. The allegations contained in paragraph 35 are conclu-

sions of law and do not require an answer; alternatively, the allegations are denied.

13. The allegations contained in paragraph 36 are admitted.

14. The allegations contained in paragraph 37, 38 and 39 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

15. Defendants adopt their responses to paragraphs 1-39 as if set forth here at length in respose to the allegations contained in paragraph 40.

16. The allegations contained in paragraph 41, 42, 43, 44 and 45 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

17. Defendants adopt their responses to paragraphs 1-45 as if set forth here at length in respose to the allegations contained in paragraph 46.

18. The allegations contained in paragraph 47, 48, 49 and 50 are conclusions of law and do not require an answer; alternatively, the allegations are denied.

WHEREFORE, defendants EDWIN W. EDWARDS, in his offical capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of the State of Louisiana, pray that this answer be deemed good and sufficient and that after due legal proceedings are had, plaintiffs' complaint be dismissed at plaintiffs' cost, with prejudice.

RESPECTFULLY SUBMITTED:

RICHARD P. IEYOUB
ATTORNEY GENERAL

/s/ Angie Rogers Laplace

Roy A. Mongrue, Jr., #9549
Angie Rogers Laplace, #19669

LOUISIANA DEPARTMENT OF JUSTICE
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CERIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18th, 1995, I served a true and correct copy of the foregoing by U.S. Postal Service to the following counsel:

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

v.

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, by counsel, pursuant to ULLR Rule 2.09 and in support of their Motion for Summary Judgment, submit the following statement of material facts as to which there is no genuine issue to be tried:

1. Plaintiff G. Scott Love is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Love is a registered voter who resides in the Sixth Congressional District of Louisiana. Love has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of G. Scott Love (attached hereto as Exhibit A).

2. Plaintiff Paul S. Bergeron is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish,

Louisiana. Bergeron is a registered voter who resides in the Sixth Congressional District of Louisiana. Bergeron has voted in the previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Paul S. Bergeron (attached hereto as Exhibit B).

3. Plaintiff Kathleen B. Balhoff is a citizen of Louisiana and of the United States who resides in East Baton Rouge Parish, Louisiana. Balhoff is a registered voter who resides in the Sixth Congressional District of Louisiana. Balhoff has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Kathleen B. Balhoff (attached hereto as Exhibit C).

4. Plaintiff Bennie Baker-Bourgeois is a citizen of Louisiana and of the United States who resides in Lafourche Parish, Louisiana. Baker-Bourgeois is a registered voter who resides in the Third Congressional District of Louisiana. Baker-Bourgeois has voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intends to do so again in the 1996 and future elections in Louisiana for the same offices. See Affidavit of Bennie Baker-Bourgeois (attached hereto as Exhibit D).

5. Defendant Edwin W. Edwards is Governor of the State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to Article IV, § 5 of the Louisiana Constitution, Edwards is responsible for executing the laws of Louisiana.

6. Defendant Fox McKeithen is Secretary of State of Louisiana and is a resident of East Baton Rouge Parish, Louisiana. Pursuant to La. R.S. § 18:421, McKeithen is the chief

election officer of Louisiana. Pursuant to La. R.S. § 18:1277, McKeithen is also responsible for certifying the results of congressional elections.

7. Since the open primary first took effect in Louisiana federal elections in 1978, there have been seventy regular elections for U.S. Representative held in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

8. Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested when only one candidate qualified for the open primary and was thereby declared elected without a contested primary election.

9. Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected outright.

10. Nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the Federal Election Day in November when the failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election.

11. Of the fifty-seven contested regular elections for U.S.. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the Federal Election Day in November.

12. Since the open primary first took effect in Louisiana federal elections in 1978, there have been six regular elections for U.S. Senator held in Louisiana. these elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

13. Five of the six contested regular elections for U.S. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected.

14. One of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on the Federal Election Day in November when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election.

DATED: September 5, 1995 Respectfully submitted,

MATHEWS, ATKINSON, GUGLIELMO, MARKS & DAY

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 5th day of September, 1995, that a copy of the foregoing pleading has been served by U.S. Mail, first class postage prepaid, or hand-delivery, upon the following counsel of record.

Roy A. Mongrue, Jr.
Angie R. Laplace
Assistant Attorneys General
Civil Division
Post Office Box 94005
Baton Rouge, Louisiana 70804

Sheri Marcus Morris, Esquire
Office of the Secretary of State of Louisiana
Post Office Box 94125
Baton Rouge, Louisiana 70804-9125

/s/ Thomas E. Balhoff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-MI

G. SCOTT LOVE, ET AL, PLAINTIFFS

versus

EDWIN W. EDWARDS, ET AL, DEFENDANTS.

STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Defendants, Edwin Edwards, Governor of the State of Louisiana and W. Fox McKeithen, Secretary of State of Louisiana, through undersigned counsel, pursuant to ULLR 29 and in support of their Motion for summary Judgment, submit the following statement of material facts as to which there is no genuine issue to be tried:

1. Requiring the state of Louisiana to place an unopposed candidate for office on the ballot for election will result in unnecessary expense to the State of Louisiana, and an unnecessary depletion of the public fisc, and will needlessly cause electors to cast meaningless votes.

2. Louisiana's open primary procedure for conducting elections in the state of Louisiana has received the requisite preclearance by the United States Attorney General.

3. The state of Louisiana has held elections on the first Tuesday following the first Monday in November, 1982 and every two years thereafter whenever more than one candidate for

U.S. Senator or U.S. Representative was qualified to run in that election.

Respectfully submitted,

Richard P. Ieyoub
Attorney General of Louisiana

/s/ Angie Rogers Laplace
ANGIE ROGERS LAPLACE
Assistant Attorney General
Bar Roll No. 19669
/s/ Roy A. Mongrue, Jr.
ROY A. MONGRUE, JR.
Assistant Attorney General
Bar Roll No. 9549
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been served upon opposing counsel of record by depositing the same in the United States Mail, postage prepaid, and properly address, this 4th day of October, 1995.

/s/ Roy A. Mongrue, Jr.
ROY A. MONGRUE, JR.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NUMBER: 95-788-B-M1

G. SCOTT LOVE, ET AL.

v.

EDWIN W. EDWARDS, ET AL.

PLAINTIFFS' STATEMENT OF DISPUTED MATERIAL FACTS / RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

NOW INTO COURT, through undersigned counsel, come plaintiffs G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois, and submit the following responses to defendants' Statement of Material Facts as to Which There is No Genuine Issue to be Tried:

1. Admitted.

2. It is admitted that the United States Attorney General has precleared elections pursuant to the voting Rights Acts, but it is not admitted that said preclearance bears upon Louisiana's compliance or noncompliance with the Federal Election Day Statutes.

3. Denied. Defendants' statement appears to imply that there is a November election whenever more than one candidate "qualifies." This is not true, unless by "qualifies" defendants mean that a candidate was one of the top two contenders

in the October election, and no candidate received more than 50% of the vote in the October election.

Respectfully Submitted:

MATHEWS, ATKINSON, GUGLIELMO,
MARKS & DAY
320 Sumerulos Street
Post Office Box 3177
Baton Rouge, Louisiana 70821-3177
(504) 387-6966

by: /s/ Daniel J. Balhoff
THOMAS E. BALHOFF (2716)
Judith R. Atkinson (17240)
Daniel J. Balhoff (18776)

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CARR, GOODSON & LEE, P.C.
1301 K Street, N.W.
Suite 400 East Tower
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(202) 310-5500

John S. Baker, Jr. (2700)
L.S.U. Law Center, Room 414
Baton Rouge, Louisiana 70803
(504) 388-8846

CERTIFICATE

I hereby certify that a copy of the foregoing was this hand delivered to:

Sheri Marcus Morris, Esq
Office of the Secretary
of State of Louisiana
19th Floor, State Capitol
900 Riverside North
Baton Rouge, LA 70802

Roy A. Mongrue, Jr., Esq.
Angie R. LaPlace
Assistant Attorneys General
Civil Division
301 Main Street, 6th Floor
One American Place
Baton Rouge, LA 70801

Baton Rouge, Louisiana, this 17th day of October, 1995.

/s/ Daniel J. Balhoff
DANIEL J. BALHOFF

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF KATHLEEN BRADY BALHOFF

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Kathleen Brady Balhoff, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information contained in the affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by the Louisiana law exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Kathleen Brady Balhoff
KATHLEEN BRADY BALHOFF

Subscribed and sworn to before me this 4th day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF GLEN SCOTT LOVE

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Glen Scott Love, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by Louisiana law from exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Glen Scott Love

GLEN SCOTT LOVE

Subscribed and sworn to before me this 3rd day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS

Plaintiffs

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA

DEFENDANTS

AFFIDAVIT OF BENNIE BAKER-BOURGEOIS

I, Bennie Baker-Bourgeois, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in Lafourche Parish, Louisiana. As a resident of Lafourche Parish, I am represented by the U.S. Representative elected from the Third Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Representative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Third Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Third Congressional District, I did not vote in the October open primary in which Billy Tauzin received a majority of the vote and was thereby elected outright under Louisiana law. I was therefore prevented by the Louisiana law from exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

6. In the 1992 elections for U.S. Representative from the Third Congressional District and U.S. Senator from Louisiana, I voted in the October open primary which resulted in the conclusive elections of Billy Tauzin as U.S. Representative and John Breaux as U.S. Senator. I returned to the polls on the Federal Election Day in November 1992 to vote for Presidential Electors. Louisiana law thus burdened me with the necessity to vote on two different days in the 1992 regular federal elections of Louisiana.

7. In the 1990 elections for U.S. Representative from the Third Congressional District and U.S. Senator from Louisiana, I did not

vote in the October open primary in which Billy Tauzin received a majority of the vote for U.S. Representative and Bennett Johnston received a majority of the vote for U.S. Senator, resulting in the outright election of both under Louisiana law. I was therefore prevented by Louisiana law from exercising my right under the Constitution and federal law to vote in the election for U.S. Representative and U.S. Senator on the Federal Election Day in November 1990.

8. Because the 1990, 1992, and 1994 election campaigns for U.S. Representative from the Third District, and the 1990 and 1992 election campaign for U.S. Senator from Louisiana all terminated prematurely in the October open primary, I was deprived of my rights to participate in the political process and advocate the election or defeat of candidates for such offices during the period between the October open primary and the Federal Election Day in these election years.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Bennie Baker-Bourgeois
BENNIE BAKER-BOURGEOIS

PARISH OF LAFOURCHE
STATE OF LOUISIANA

Subscribed and sworn to before me this 31st day of August, 1995.

/s/ Margaret Smith Sallors
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B-M1

G. SCOTT LOVE, ET AL.

versus

EDWIN W. EDWARDS, ET AL.

AFFIDAVIT OF PAUL S. BERGERON

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Paul S. Bergeron, after being duly sworn, hereby state the following:

1. I submit this affidavit in support of the Plaintiffs' Motion for Summary Judgment. The information contained in this Affidavit is based on personal knowledge.

2. I am a citizen of the United States and a citizen of Louisiana. I reside in and am registered to vote in East Baton Rouge Parish, Louisiana. As a resident of East Baton Rouge Parish, I am represented by the U.S. Representative elected from the Sixth Congressional District of Louisiana.

3. By the term "Federal Election Day" as it is used in this affidavit, I mean the day in November mandated by federal law for the holding of regular elections for U.S. Representatives, U.S. Senators, and Presidential Electors.

4. I intend to vote in the regular elections for U.S. Represen-

tative, U.S. Senator, and Presidential Elector in 1996. Because the open primary for U.S. Representative from the Sixth Congressional District and U.S. Senator currently scheduled under Louisiana law for October 6, 1996 is potentially a conclusive election, I intend to vote in such open primary. If I fail to vote in such open primary, I may be foreclosed from voting for U.S. Representative and U.S. Senator in 1996, because any candidate that receives a majority of the vote in the open primary will be elected and there will be no election for such office on the Federal Election Day on November 5, 1996. I intend to return to the polls on Federal Election Day, November 5, 1996, to vote for Presidential Electors. To ensure my right to vote for U.S. Representative, U.S. Senator, and Presidential Electors in 1996, I am burdened by Louisiana law with the requirement to vote on two different days: the October 6, 1996 open primary, and the Federal Election Day on November 5, 1996.

5. In the 1994 election for U.S. Representative from the Sixth Congressional District, I was prevented by the Louisiana law exercising my right under the Constitution and federal law to vote in an election for U.S. Representative on the Federal Election Day in November 1994.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/ Paul S. Bergeron
PAUL S. BERGERON

Subscribed and sworn to before me this 26th day of September, 1995.

/s/ Daniel J. Balhoff
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788-B

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS, PLAINTIFFS

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, DEFENDANTS

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of the defendants and against the plaintiffs dismissing this suit with prejudice.

Baton Rouge, Louisiana, April 11, 1996.

/s/ Frank J. Polozola
FRANK J. POLOZOLA

United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 95-788

G. SCOTT LOVE, PAUL S. BERGERON; KATHLEEN B. BALHOFF; AND BENNIE BAKER-BOURGEOIS

versus

EDWIN W. EDWARDS, GOVERNOR OF LOUISIANA; AND FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA

RULING ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. the Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

Therefore:

IT IS ORDERED that the defendants' motion for summary judgment be and it is hereby **GRANTED.**

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment be and it is hereby **DENIED.**

Judgment shall be entered dismissing the plaintiffs' suit with prejudice.

Baton Rouge, Louisiana April 11, 1996.

/s/ Frank J. Polozola
FRANK J. POLOZOLA

United States District Judge

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

(Filed July 30, 1996)

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Respondents,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF THE STATE OF TLOUISIANA, and FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Before DAVIS and DENNIS, Circuit Judges, and FALLON*, District Judge.

DAVIS, Circuit Judge:

Respondents, four Louisiana voters, appeal from the district court's order granting defendants' motion for summary judgment and dismissing plaintiffs' suit seeking declaratory and injunctive relief on grounds that Louisiana's method of conducting congressional elections violates the Constitution and laws of the United States. We reverse.

*District Judge of the Eastern District of Louisiana, sitting by designation.

I.

In August 1995 four Louisiana citizens, who are registered to vote in Louisiana and who have a history of voting in congressional elections, filed this action for declaratory and injunctive relief. They seek this relief under 42 U.S.C. s 1983 and pursuant to our federal question jurisdiction to resolve a Constitutional claim. Their core allegation is that the Louisiana open primary system violates the federal statutes that establish a uniform federal election day for members of Congress and must yield under the Supremacy Clause of the Constitution. After crossmotions for summary judgment were filed, the district court granted summary judgment for the defendants. The respondents filed a timely appeal.

II.

We review a district court's grant of summary judgment de novo. *Mozeke v. International Paper Co.*, 856 F.2d 722, 724 (5th Cir.1988). In deciding this appeal, we address only the pre-emption claim. *See Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983).

In *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), the Supreme Court summarized the theories under which state laws are preempted as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal

> law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

Id. at 368-69, 106 S.Ct. at 1898-99 (internal citations omitted).

We start our pre-emption analysis from the bedrock premise that Congress has authority to enact the requirements for federal elections. Article I, Section 4, Clause 1 of the Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

In *Smiley v. Holm*, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), the Court, interpreting Art. I, § 4, Cl. 1, stated that "[i]t cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration,...." Id. at 366, 52 S.Ct. at 399.

In 1872, Congress established a uniform election day for elections for U.S. Representatives by enacting 2 U.S.C. § 7, which states:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the

> Congress commencing on the 3d day of January next thereafter.

This same election day was later adopted for elections for U.S. Senators in 2 U.S.C. § 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

Congress also set this day for the election of presidential electors. 3 U.S.C. §1. [1]

Congress in 2 U.S.C. §§ 1, 7 therefore declared that all elections for Congress should be held on the same date, the Tuesday following the first Monday in November (federal election day). This declaration was subject to only two exceptions: (1) in states that required a majority vote for election, a runoff could be held between federal election day and January when officials take office; and (2) an election could be held on a different date if a vacancy occurred in the office. 2 U.S.C. § 8. [2] In adopting this scheme, Congress precluded a state from hold-

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[1] 3 U.S.C.§1 states:
The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

[2] 2 U.S.C. § 8 states:
The time for holding elections in any State, District, or Territory

ing an election in which members of Congress could be elected before the federal election date.

This interpretation is supported by the legislative history. This history indicates that Congress wanted a uniform election day to prevent earlier elections in some states unduly influencing the later voters, to prevent fraudulent voting in multiple state elections, and to remove the burden of voting in more than one federal election in a given year. Cong.Globe, 42d Cong., 2d Sess. 112 (1871).[3]

The legislative history of 2 U.S.C. § 8 also supports the conclusion that Congress intended any outcome determinative election to be held on federal election day unless it fell within the exception in § 8. During the consideration of § 8, Senator

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for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

[3] Mr. Butler who introduced the amendment stated the following reasons:

> But on account of the facility for colonization and repeating among the large central States, New York holding its election in November, and Ohio, Pennsylvania, and Indiana holding their elections in October, the privilege is allowed the border States, if any man is so disposed, of throwing voters across from one into the other. I think it will be fair for everybody that on the day when one votes all should vote, and that the whole question should be decided then. Again, there is another and a different question. Every fourth year many of the States have to hold two elections: one for the State on one day, and one for

Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect*. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a vacancy, and *still more seldom that there is a failure to elect*. In all those States in which a plurality elects, no such thing as failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot. . . .

> the electors of President and Vice President on another day. This throws a great burden needlessly and uselessly, it seems to me, upon the people, and I move this for the purpose of having a uniform election to take place in the future at a time when all the State constitutions as to State elections may be conformed to it.

Cong.Globe, 42d Cong., 2d Sess. 112 (1871).

On a different day, Mr. Butler reintroduced this amendment and stated:

> Unless we do fix some time at which, as a rule, Representatives shall be elected, it will be in the power of each State to fix upon a different day, and we may have a canvass going on all over the Union at different times. It gives some States undue advantage. It gives some parties undue advantage.... But what I contend is that is an undue advantage, that it is a wrong, and it is a wrong also to the people of those States, that once in four years they shall be put to the trouble of having a double election. On every election day the poor laboring man who goes to the polls to vote loses his day's work, to say nothing of the expenses which fall on the politicians, and are of no very great consequence one way or the other. Cong.Globe, 42d Cong., 2d Sess. 141 (1871).

> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number.* Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

Cong.Globe, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

For all of the above reasons, we conclude that Congress intended that all determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8.

We turn next to the Louisiana election scheme which respondents contend conflicts with 2 U.S.C. §§1, 7. Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes. The pre-1978 Louisiana law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. *See* La.Rev.Stat. § 18:546 (now repealed).

In 1978, Louisiana drastically changed its method for selecting federal and state officials by adopting an open primary system. Under this system, all candidates, regardless of party

affiliation, appear on the same ballot and all voters regardless of party affiliation may vote for the candidate of their choice. La.Rev.Stat. § 18:401(B). [4]

This open primary is ordinarily [5] held "on the first Saturday in October next preceding the date of the general election." La.Rev.Stat. § 18:1272(A). [6] *See also* La.Rev.Stat. § 18:1272(B). To win in the October primary, a candidate must receive a majority of the votes cast. Louisiana holds its general election on the federal election day. *Id.* But the names of congressional candidates (like candidates for statewide office) only appear on the general election ballot if no single candidate receives a majority of the votes in the primary and a runoff between the two top candidates is required. La.Rev.Stat. § 18:1271. [7]

Thus the Louisiana open primary system allows contested

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[4] La.R.S. § 18:401(B) states:
B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

[5] The primary is scheduled for September 21 this year because October 5 is a religious holiday.

[6] La.R.S. § 18:1272(A) states:
A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

[7] La.R.S. § 18:1271 states:

elections for Congress to be decided in the primary, which is held at least one month before the general election. This is the portion of the Louisiana election scheme that respondents contend is in conflict with 2 U.S.C. §§ 1, 7. The Louisiana election code provides that: "A candidate who receives a majority of the votes cast for an office in a primary election is elected." La.Rev.Stat. § 18:511(A). When the seat in Congress is filled in the October primary, no candidate's name appears on the ballot in the November general election and no vote for that office can be cast on the federal election date. In fact, since 1978 over 80% of the contested congressional elections have been decided in the October primary. Only nine of fifty-seven contested elections for U.S. Representatives and one of six contested elections for U.S. Senator had candidates placed on the general election ballot for November.

Respondents argue that the 2 U.S.C. §§ 1, 7 sets the earliest day that a state may hold a contested election for Congress where the winner may be determined. Respondents contend that the Louisiana election system conflicts with this provision by allowing such an election at an earlier date.

Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a]

Except as otherwise provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

candidate who receives a majority of the votes cast for an office in a primary election *is elected.*" La.R.S. § 18:511(A) (emphasis added).

We agree with respondents that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters. Thus, the Louisiana system as applied to federal elections must yield under the Supremacy Clause.

III.

[4] Having decided that the Louisiana open primary election scheme conflicts with 2 U.S.C. §§ 1, 7, we now turn to a consideration of the appropriate remedy.

Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law. See *Frost v. Corporation Common*, 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929). This drastic remedy would require us to radically overhaul the state's election procedure and reinstate an election system which the state abolished eighteen years ago.

In exercising our discretion in granting or withholding an injunction we balance "the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Yakus v. United States*, 321 U.S. 414, 440, 64 S.Ct. 660, 675, 88 L.Ed. 834 (1944).

Courts should be particularly loathe to preempt a state legislative task such as establishing an election scheme. Even in reapportionment cases where the voters' Fourteenth Amendment rights to equal protection is infringed, federal courts fre-

quently give the state an opportunity to remedy the defect before fashioning a judicial remedy. *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109 (5th Cir.1991); *Mississippi State Chapter, Operation Push, Inc., v. Mabus*, 932 F.2d 400 (5th Cir.1991).

In addition to this federalism concern, a number of additional factors weigh against the issuance of an injunction: (1) The campaign for statewide and federal offices for the September 21 open primary election is well under way. Qualification date for candidates for those offices closed on Friday, July 12, 1996. Enjoining that election would be expensive for the candidates and the State. Ordering another election at a different time would also be confusing to the voters. (2) By contrast, the injury to the plaintiffs will be relatively minimal. To be assured of participating in the election of their representatives and senators, plaintiffs must vote on September 21. But they have the right to vote in those elections on that date and if they do so, their vote will count. If plaintiffs' representatives and senators are elected on September 21, they will be required to return to the polls on November 5 to vote in the presidential election. However, compared with the cost of enjoining the September 21 election, two trips to the polls is a relatively minor cost.

CONCLUSION

For the reasons discussed above, we conclude that plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day. The next scheduled session of the Louisiana legislature is in May 1997. We remand this case

to the district court with directions to reconsider plaintiffs' request for injunctive relief if the state has not acted to resolve the conflict within a reasonable time after the 1997 legislative session. We also remand all remaining issues in this case to the district court. [8]

REVERSED and RENDERED.

DENNIS, Circuit Judge, dissenting:

Article I, Section 4, Clause 1 of the United States Constitution establishes the power and the duty of each state legislature to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to the power of the Congress to "at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Thus, except to the extent that Congress acts to change or supplement state laws, the States retain broad authority to regulate elections under the Times, Places and Manner Clause. It cannot be doubted that the Clause invests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns[ ]." *Smiley v. Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795 (1932).

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[8] We decide this case under our federal question jurisdiction to resolve a claim under the Supremacy Clause. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983). The issues not considered in this opinion include whether plaintiffs have stated a claim for a violation of the Privileges and Immunities Clause of the Fourteenth Amendment and whether plaintiffs have stated a claim enforceable under 42 U.S.C. § 1983.

This view is confirmed by the second clause of article 1, § 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regulations or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It "has a general supervisory power over the whole subject." [Citations omitted.] But this broad authority is conferred by the constitutional provision now under consideration, and is exercised by the Congress in making "such regulations"; that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the Legislature of the state upon the same subject.

Id. at 366-367, 52 S.Ct. at 399. *See also, Roudebush v. Hartke,* 405 U.S. 15, 24-25, 92 S.Ct. 804, 810-11, 31 L.Ed.2d 1 (1972); ("Unless Congress Acts, Art. I, § 4, empowers the States to regulate the conduct of senatorial elections."); *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974) ("[ ] Art I, § 4, cl 1, authorizes the States to prescribe '[t]he Times, Places and Manner of holding Elections for Senators and Representatives.' "); *United States v. Classic,* 313 U.S. 299, 311, 61 S.Ct. 1031, 1035-36, 85 L.Ed. 1368 (1941) ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.")

Congress, in deference and respect to the states, has been slow to exercise the powers expressly conferred upon it in re-

lation to elections by the fourth section of the first article of the Constitution. See, "The Ku-Klux Cases." *Ex Parte Yarbrough et al.,* 110 U.S. 651, 660-662, 4 S.Ct. 152, 156- 58, 28 L.Ed. 274 (1884). It was not until 1842 that Congress took any action under the Times, Places and Manner Clause by providing that each member of Congress should be elected by a separate district, composed of contiguous territory. 5 St. 491. *Id.* Thirty years afterwards, in an act to apportion representatives to Congress among the several states according to the ninth census, Congress provided for the first time a regulation for the time of holding elections of representatives. The Act of Feb. 2, 1872, ch. 11. §§ 3 and 4, 17 Stat 28, 29, in pertinent parts, provides:

> Sec. 3. That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is hereby fixed and established as the day for the election, in each of said States and territories, of Representatives and delegates to the Congress commencing on the fourth day of March next thereafter.
>
> Sec. 4. That if, upon trial, there shall be a failure to elect a Representative or Delegate in Congress in any State, District, or Territory, upon the day here by fixed and established for such election, or if, after any such election, a vacancy shall occur in any such State, District, or Territory, from death, resignation, or otherwise, an election shall be held to fill any vacancy caused by such failure,

> resignation, death, or otherwise, at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur.

In substance, the same provisions have been continued in the present federal statutes regulating the time of holding elections for Representatives. 2 U.S.C. § 7 provides that the Tuesday next after the first Monday in November, in every even numbered year, is established as the day for the election in each of the states and territories. 2 U.S.C. § 8 provides that the time for holding elections for Representative to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several states and territories respectively.

The Louisiana laws prescribing the times, places and manner of holding elections for Senators and Representatives provide for "open" primary and general elections. All qualified voters may vote for candidates in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it. La.R.S. 18:401(B). The times for the elections are fixed as follows: (a) The primary election is held on the first Saturday in October next preceding the date of the general election, La.R.S. 18:1272(A); and (b) the general election is held on the Tuesday next after the first Monday in November in every even numbered year, i.e., on the federal election day. La.R.S. 18:1272(B). The Louisiana laws also provide that a candidate who receives a majority of the votes cast in the primary election "is elected." La.R.S. 18:511(A).

The plaintiffs contend that the Louisiana election laws are

unconstitutional because they (a) allow a possibility that a candidate for Representative will be elected by receiving a majority of votes in the primary election; (b) and are thus contrary to the federal statute which requires that a Representative be elected on the federal election day, which Louisiana designates as the general election day.

The Supremacy Clause, Art. V, cl. 2 of the United States Constitution, provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The United States Supreme Court has developed a doctrine of preemption for deciding when a state law or constitution, in whole or in part, is "contrary" to the United States Constitution, or a valid federal law or treaty, made in pursuance thereof, that requires the state provision to yield to the federal. The principal precepts comprising this doctrine were summarized recently by the court in *Northwest Central Pipeline Corporation v. State Corporation, Commission of Kansas*, 489 U.S. 493, 509, 109 S.Ct. 1262, 1273, 103 L.Ed.2d 509 (1989):

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regu-

lation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

Applying the preemption precepts to the Louisiana laws prescribing the times, places and manner of electing Representatives, it is clear that, under the supremacy clause, the state's laws are not contrary to the federal statutes that partially regulate the same subjects. Obviously there is no explicit statutory language signaling an intent to pre-empt, and we cannot infer an intention to occupy the entire field of election regulation because Congress has not legislated comprehensively on the subject. The plaintiffs present no argument to this effect but contend that the state law at issue conflicts with the federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

In order to demonstrate that it is impossible to harmonize

or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of the those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day. The few remarks by Senators Butler and Thurman express concern over each state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. See majority opinion p. 5, n. 3, and p. 6. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday

in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day. [1] The plaintiffs have not supplied any statistics by which we may compare the open primary to the party primary and other systems. However, during the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence the party primary system probably resulted proportionately in even fewer actual

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[1] For much of the history of the electoral party primary, Louisiana, like the rest of the South, was a one-party state in which general elections meant little. Paul Grosser, "Political Parties." LOUISIANA POLITICS; FESTIVAL IN A LABYRINTH 257 (1982). See also, *United States v. Classic*, 313 U.S. 299, 314 n. 2, 61 S.Ct. 1031, 1037 n. 2, 85 L.Ed. 1368 (1941). "Since the end of Reconstruction, the Republican party in Louisiana had served as little more than a nominal element in state politics. The domination of the Democratic party was so pervasive that victory in a Democratic primary invariably meant election." Bennett Wall, LOUISIANA: A HISTORY 2nd Ed. 362 (1990). The Republicans only fielded candidates on an "episodic" basis, and did not elect a member of Congress (after Reconstruction) until 1972. Grosser, *supra* at 257-8. During all of those decades in which many states held general elections which were often uncontested and usually mere formalities, Congress never chose to act to require the de facto determinative election to be held on federal election day.

contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Supreme Court observed:

> Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.
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> * * *
>
> [T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.[2]

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[2] For a discussion of the practical effect of the primary in controlling or restricting election of candidates at general elections, see, Hasbrouck, Party Government in the House of Representatives

* * *

> Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. . . .

Id. at 311, 313-314, 318-319, 61 S.Ct. at 1035-36, 1036-37, 1039.

Nevertheless, the plaintiffs concede that "[p]rior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Respondents' Brief at p. 32. Accordingly, they argue that this court should strike down the open primary law as it applies to Congressional elections and "revive Louisiana's pre-1978 election system for Congressional elections to the extent practicable because the pre-1978 election system is 'the only valid expression of the legislative intent.' Frost, 278 U.S. at 526-27, 49 S.Ct. at 239." *Id.* This concession and Congress's refusal during the past century to abolish or alter state party primary regulations casts grave doubt on Respondents' argument that it was Congress's intent by the Federal Election Day laws to insure that contested Congressional elections, or the opportunity to qualify for them, take place in every district on each federal election day. Because it is upon this erroneous interpretation of the Federal Election Day laws that respondents

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(1927) 172, 176, 177; Merriam and Overacker, Primary Elections (1928) 267-269; Stoney, Suffrage in the South; 29 Survey Graphic, 163, 164.

rely to show that the state's open election laws are contrary thereto and that it is impossible to comply with both, their argument in this respect is without merit.

Appellants and the majority find significance also in the fact that La.R.S. 18:511(A) provides that "[a] candidate who receives a majority of the votes cast for an office in a primary election is elected." Because the Federal Election Day laws do not necessarily preclude a candidate from being declared elected after receiving a majority of the votes in the open primary, I do not believe this provision is contrary to the federal law. However, if the majority concludes that this provision alone prevents the open elections laws from passing Supremacy Clause muster, it would be a simple matter for this court to enjoin such a declaration that a congressional candidate is elected until the federal election day, rather than declaring the whole law unconstitutional in its application to Congressional elections.

Nor is the state's open elections law contrary to the Federal Election Day laws because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. 2 U.S.C. § 7 was enacted, the Supreme Court has observed, "to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States." *Ex parte Yarbrough,* 110 U.S. 651, 661, 4 S.Ct. 152, 157, 28 L.Ed. 274 (1884). But those evils unduly benefiting certain states and political parties and unnecessarily burdening voters and politicians, Cong. Globe, 42nd Cong., 2d Sess. 141 (1871) (remarks of Senator Butler), are not perpetuated by the current state open elections laws any more, if at all, than by the previous party primary laws that respondents wish us to revive. As noted above, the legislative history indicates that

the evil perceived by Congress at that time was the unbridled power of the states to independently arrange their election dates in a haphazard and pernicious manner completely untethered to a federally prescribed national election day. Although the present law does impose the burden of double elections on employed voters, so did the old party primary law and so does virtually every other election system. The passage of time, however, "has mitigated those burdens to the extent that "the poor laboring man" no longer "loses his day's work" by going to the polls." *Id. See Busbee v. Smith*, 549 F.Supp. 494, 524 (D.D.C.1982). Improvements of registration and election laws have greatly reduced the danger of a voter crossing state lines to vote in more than one Congressional district election. The advent of polling coupled with the instantaneity of modern media coverage has largely superceded whatever effects the outcome of a congressional primary in one state may have on an election in another.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

N0. 96-30429

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Plaintiffs-Appellants,

VERSUS

MICHAEL J. FOSTER, JR., GOVERNOR OF THE STATE OF LOUISIANA, and FOX MCKEITHEN, SECRETARY OF STATE OF LOUISIANA,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

RULING ON PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

(Filed November 15, 1996)

Before DAVIS, DENNIS and FALLON[1], District Judge.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. Judge Dennis would grant rehearing for reasons stated in his dissent. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, the Petition for Rehearing En Banc is DENIED.

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1. District Judge of the Eastern District of Louisiana, sitting by designation.

In response to the petition for rehearing, we make it clear that all we hold is that Louisiana's election plan, to the extent it precludes any legal election for United States Representatives and Senators on Federal Election Day, conflicts with 2 U.S.C. §§1 and, 7 and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on Federal Election Day and provide for a runoff election between November and January when the elected member of Congress takes office. *See* 2 U.S.C. § 8.

DENNIS, Circuit Judge, with whom POLITZ, Chief Judge and SMITH, Circuit Judge join, dissenting from failure to grant rehearing en banc.

I respectfully dissent from the court's failure to grant rehearing en banc because (1) the panel majority erroneously declared a state statute preempted by a federal law due to its failure to correctly apply the controlling Supreme Court precedents regarding federal preemption; and, (2), even as supplemented by per curiam, the panel opinion should be clarified and limited because it casts doubt on the constitutionality of all other state primary election systems.

1. The state statute should be upheld under a correct preemption analysis. The consideration of whether a state law is contrary to the Constitution or a federal law and must, therefore, yield under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (citation omitted) ("'[T]he historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'"). Accordingly, the party claiming preemption has the burden of proof, *see* 2 Rotunda &

Nowak, *Treatise on Constitutional Law* § 12.4 at 90 (2d ed. 1992), and must persuade the court that preemption is proper in one of several ways.

"First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a intent known through explicit statutory language, the courts' task is an easy one." *English v. General Electric Co.*, 496 U. S . 72, 78 - 79 (1990)(citations omitted).

"Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject' . . . . [However], '[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be '"clear and manifest."'" *Id.* at 79.

"Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found preemption [1] where it is impossible for a private party to comply with both state and federal requirements, or [2] where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

The plaintiffs, G. Scott Love and others, failed to overcome the presumption that "Congress did not intend to displace state law[,] " *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) . Nor did they carry their burden of proof to show that preemption is proper in one of the prescribed ways.

The plaintiffs correctly, although tacitly, conceded that Congress did not insert specific preemptive language into the federal election day law that explicitly preempted Louisiana's power to regulate Congressional elections. Nor did they base their argument on a field preemption rationale. Moreover, it is evident there was no "clear and manifest" intent on the part of Congress to displace the states' historic function of conducting and regulating Congressional elections. As the Supreme Court in *Storer v. Brown,* 415 U.S. 724, 729-730 (1974) recognized:

> [U]nder our Constitution . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art I, §2, cl 1. Also Art I, § 4, cl 1, authorizes the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Furthermore, the plaintiffs did not contend, and the panel majority did not decide, that the state election law actually conflicts with the federal election day law for the first reason that a state law can be conflict-preempted; i.e., that it is impossible for a private party to comply with both state and federal requirements. The federal election day law applies to the states, not individuals, and therefore places no requirements

upon private parties that might conflict with regulation of their conduct by the state.[1]

The issue of preemption under the Supremacy Clause is narrowed then to this: Does the state statute "actually conflict" with federal law because the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"?

It is not disputed that the main purpose of the federal law, as clearly demonstrated by its text and legislative history, is to

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1. Two cases in which that conflict theory was argued but rejected further demonstrate its irrelevance here. In *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-143 (1963), the case usually cited for the first conflict-preemption rule, the Supreme Court observed that "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce." In that case, the Supreme Court concluded that no federal-state law conflict existed where federal marketing orders forbidding the picking and shipping of South Florida avocados before a certain date do not render invalid, on the ground of impossibility of dual compliance, a California statute prohibiting the sale of avocados containing less than 8 percent of oil, by weight, excluding the skin and seed, where Florida avocados marketed in California attain or exceed 8 percent when in prime commercial marketing condition, and Florida growers may avoid rejection of their avocados in California by leaving them on the trees beyond the earliest picking date set by the federal orders. Thus, the Court concluded that the present record demonstrated no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards. *Id.* at 142-143. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238(1984), the Supreme Court held that a state law authorizing award of punitive damages was not pre-empted by the Atomic Energy Act. The Court concluded that the award of punitive damages did not conflict with the federal remedial scheme under which the NRC is authorized to impose civil penalties on licensees for violation of federal standards because paying both federal fines and state-imposed punitive damages for the same incident is not physically impossible and exposure to punitive damages does not frustrate any purpose of the federal remedial scheme.

establish the federal election day to restrict the states' original powers to conduct Congressional elections in different, dispersed months of the year. Congress feared that, without a federally prescribed benchmark, there could be undue influence upon election results by states' strategic timing of elections and unscrupulous individuals "throwing voters" from one state to another; and that voters would be burdened with double elections in Presidential election years.

The plaintiffs concede that the traditional partisan state primary systems, such as Louisiana's pre-1978 system, do not actually conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[2] They admit this even though they also acknowledge that state partisan primary systems frequently determine the outcome of congressional elections prior to the federal election day.[3] The crucial distinction between the partisan primary system and Louisiana's current open primary system for preemption purposes, they contend, however, is that while partisan primary elections may be determinative *de facto*, they are not conclusive *de jure*, because it is usually theoretically possible under such state laws for a non-primary candidate to get on the general election ballot on federal election day through nomination papers or write-in procedures. *See* Appellants' Brief at 10 and Reply Brief at 6.

2. "Prior to the enactment of the open primary regime in 1978, Louisiana's Congressional election system complied with the Federal Election Day Statutes." Appellants' Brief at 32; "Primary elections, partisan or otherwise, in advance of Federal Election Day ballot are permissible under the Federal Election Day Statutes so long as such 'primaries' are not conclusive *ipso jure*." *Id.* at 17.

3. "The [appellants] do not dispute that where only *one* candidate 'qualifies' for U.S. Representative or U.S. Senator in the sense of timely filing the appropriate candidacy papers and otherwise meeting the relevant age and residence requirements, that candidate is indeed "unopposed" on the Federal Election Day ballot, and the State is not required to place such candidate's name on the Federal Election Day ballot." Appellants' Reply Brief at 6.

See also United States v. Classic, 313 U.S. 299, 311 (1941): "In common with many other states Louisiana has exercised [its] discretion [under §2 of Article I of the Constitution] by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary."

The plaintiffs fail to demonstrate, however, that the Louisiana open primary law hinders the accomplishment of the purpose of the federal election day law. Certainly, they have not shown that it does so any more than Louisiana's former party primary law or other typical partisan primary systems. Neither the Louisiana open primary system nor the typical partisan primary system frustrates the federal statute's goal of controlling and containing the power of the states to independently arrange congressional elections by requiring that they be tied to a common termination date. Nor does either primary system present an obstacle to the federal objective of guarding against "throwing voters" from state to state. The open primary does not hinder, any more than the partisan primary, the federal objective of elimination of unnecessary elections and undue influence due to the timing of elections. The text and the legislative history of the federal statute do not reveal a clear congressional purpose to oust or displace state powers to enact state open primary systems or partisan primary systems that use the federal election day as the general election date. The most plausible inference from the federal law establishing the federal election day is that Congress did not contemplate that state power to enact any reasonable primary system incorporating the federal election day would be impaired.

Because the Supreme Court is "generally reluctant to infer

preemption," *e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978), and cases cited therein, Congress must speak clearly and make its intention to preempt unmistakable.

Under the standard applicable here, there is no "actual conflict" unless the state law frustrates the purposes of the federal law. This criterion is not easy to meet. For example, a state law does not frustrate federal purposes merely because it provides for less competition, *La.Pub.Serv.Com. v. FCC*, 476 U.S. 355 (1986), or requires that federally licensed vessels in interstate commerce also meet local pollution standards, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), or prohibits items transported in interstate commerce that do not meet state maturity standards which are set higher than federal maturity standards. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). In all these cases, the state requirements place hurdles in the way of federal regulation, but theses hurdles are not treated as improper unless the party claiming preemption proves that Congress clearly intended to preclude concurrent state and federal regulation. *See* 2 Rotunda & Nowak, *Treatise on Constitutional Law* § 12.4 at 91 (2d ed. 1992).

The Supreme Court's recent preemption cases signal that, out of respect for Federalism, the more democratic branches of the central government should be preferred to make the primary decisions limiting the power of the states to regulate concurrently with the federal government. Because Congress has the ultimate power to decide preemption cases—Congress after all can always overrule the Court on this question—Congress ought to exercise this power unambiguously and shoulder the ultimate responsibility as well. *Id.; cf. Michigan v. Long*, 463 U.S. 1032 (1983)(states should not be bound by phantom federal restrictions).

2. If not overruled, the panel decision should be limited and clarified. The panel majority evidently was not at first

convinced by the plaintiffs' argument that *de facto* determinative primary elections may stand because they do not "actually conflict" with the federal election day law, while *de jure* determinative primary elections do conflict and are therefore preempted. Instead of distinguishing between *de facto* and *de jure* determinative primary elections, the panel held sweepingly that "Congress intended that *all* determinative federal elections be held on federal election day except for the rare exceptions specified in 2 U.S.C. § 8." *Love v. Foster*, 90 F.3d 1026, 1030 (emphasis added). Specifically, 2 U.S.C. § 8 provides that "[t]he time for holding elections . . . for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively." Under the panel majority holding, any system permitting a determinative primary election, whether *de facto* or *de jure*, before the federal election day, is preempted. According to the original panel decision, only elections by plurality vote on the federal election day or primaries held on that day, followed by run-off elections afterwards, are permissible, because all election day primary systems allow the possibility of either *de facto* or *de jure* determinative elections, both of which "actually conflict" with the federal law.

The panel majority's supplemental per curiam suggests, but does not clearly acknowledge, abandonment of its original broad holding in favor of a rationale based on the *de jure—de facto* distinction underlying the plaintiffs' argument. The per curiam states that "all we hold is that Louisiana's election plan, to the extent it precludes any *legal* election...on Federal Election Day, conflicts with..." the federal election day law. (emphasis added)

The panel majority's resolution of the case is flawed in sev-

eral respects. The court is left without a single, clear justification for its decision. The panel neither clearly states its intention to jettison its original broad holding nor offers any explanation for its approval of a strictly *de jure—de facto* rationale. Consequently, the doubt that the initial opinion casts on all pre-federal election day primary systems has not been dispelled; and the per curiam is void of any demonstration of a Congressional intent to displace either open or partisan primary systems that incorporate the federal election day. As a further result, the panel majority fails to give clear guidance to states in the framing of election laws. Although it suggests one way to devise an open primary system compatible with federal law, the two rationales the panel majority in turn embraces suggest other contradictory possibilities—on the one hand, that no pre-federal election day primaries that might result in *de facto* elections are permissible; on the other, that an open election system such as Louisiana's will pass muster if it prevents *de jure* determinative primary elections by allowing for write-in candidates and by requiring that a primary victor's name be placed on the ballot on the federal election day.

Conclusion

This case presents issues worthy of the time, attention, and efforts of the entire court, viz., whether the panel precipitously declared state statutes preempted by federal law without following the teachings of the Supreme Court, and whether the panel decision's potential serious impact on other state primary election systems warrants further clarification and limitation. Accordingly, I respectfully dissent from the court's decision to deny reconsideration of this case.

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QUESTION PRESENTED

Whether Louisiana Revised Statutes §§ 18:511(A), 18:1272(A), and 18:402(B)(1), which in combination permit congressional elections to occur on the first Saturday of October of an election year, are preempted by 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the first Monday in November" of an election year.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 4, cl. 1 of the U.S. Constitution:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article VI, cl. 2 of the U.S. Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2 U.S.C. § 1:

§ 1. Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 7:

§ 7. Time for election

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

2 U.S.C. § 8:

§ 8. Vacancies

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

Louisiana Revised Statute § 18:401

§ 401. Purpose and nature of primary and general elections

A. Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. Nature. All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify

for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statute § 18:402(B)

§ 402. Dates of primary and general elections

B. Congressional elections. Elections for members of Congress and officers elected at the same time as members of Congress shall be held every two years, beginning in 1982.

(1) Congressional primary elections shall be held on the first Saturday in October of an election year.

(2) Congressional general elections shall be held on the first Tuesday after the first Monday in November of an election year.

Louisiana Revised Statute § 18:481

§ 481. Candidates who qualify for a general election

The candidates who qualify for each office remaining to be filled in the general election are those who received the two highest numbers of votes, the four highest numbers of votes, and so on among those not elected in the primary election, until the maximum number of candidates for each office on the general election ballot is reached.

Louisiana Revised Statute § 18:511

§ 511. Election of candidates in a primary election

A. Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election is elected. . . .

B. Election of unopposed candidates for public office. If, after the close of the qualifying period for candidates in a primary election, the number of candidates for a public office does not exceed the number of persons to be elected to the office, the candidates for that office, or those remaining after the withdrawal of one or more candidates, are declared elected by the people, and their names shall not appear on the ballot in either the primary or the general election.

Louisiana Revised Statute § 18:1271

§ 1271. Applicable laws

Except as otherwise specifically provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers.

Louisiana Revised Statute § 18:1272

§ 1272. United States senators, representatives in Congress; time of electing

A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday

next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

STATEMENT OF THE CASE

Respondents G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois (the "Voters") are registered Louisiana voters who reside in East Baton Rouge and Lafourche parishes. They commenced this action against Petitioners (the "State" or "Louisiana") for declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202 on August 8, 1995 in the United States District Court for the Middle District of Louisiana. The Voters' complaint alleged that Louisiana Revised Statutes §§ 18:402(B)(1), 18:511(A), 18:1271, and 18:1272, which in combination provide for congressional elections to take place on the first Saturday of October of an election year, violate 2 U.S.C. §§ 1 and 7, which require that congressional elections occur on the "Tuesday next after the 1st Monday in November" of an election year. J.A. 18 ¶ 44.

The parties promptly filed cross-motions for summary judgment. In support of the Voters' motion for summary judgment, the Voters submitted a statement of material facts which they contended were undisputed and presented no issue for trial:

- The Voters are U.S. and Louisiana citizens and are registered to vote in Louisiana. The Voters have voted in previous federal elections in Louisiana for U.S. Representative, U.S. Senator, and Presidential Elector, and intend to do so again in future elections in Louisiana for the same offices.

- The Petitioners are public officials responsible for executing and enforcing Louisiana's election laws.

- Since the open primary first took effect in Louisiana congressional elections in 1978, there have been seventy regular elections for U.S. Representative held in Louisiana's eight (1978-1990) and later seven (1992-1994) congressional districts.

- Thirteen of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 18.5%, were uncontested when only one candidate qualified for the open primary and was thereby declared elected without a contested primary election.

- Forty-eight of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 68.5%, were determined conclusively in the contested open primary

and thus held on such day when one candidate received a majority of the vote and was thereby elected outright.

- Nine of the seventy regular elections for U.S. Representative held in Louisiana since 1978, or 12.8%, were held on the federal election day in November when the failure of any candidate to receive a majority of the vote in the contested open primary resulted in a run-off election.

- Of the fifty-seven contested regular elections for U.S. Representative held in Louisiana since 1978, forty-eight, or 84.2%, were determined conclusively in the open primary and thus held on such day, and nine, or 15.7%, were determined in run-off elections held on the federal election day in November.

- Since the open primary first took effect in Louisiana congressional elections in 1978, there have been six regular elections for U.S. Senator held in Louisiana. These elections took place in 1978, 1980, 1984, 1986, 1990, and 1992. All of these elections were contested.

- Five of the six contested regular elections for U.S. Senator held in Louisiana since 1978, or 83.3%, were determined conclusively in the open primary and thus held on such day when one candidate received a majority of the vote and was thereby elected.

> One of the six contested elections for U.S. Senator held in Louisiana since 1978, or 16.6%, was held on federal election day in November when the failure of any candidate to receive a majority of the vote in the primary resulted in a run-off election.

J.A. 28-31. The State did not deny these facts and hence they were deemed admitted pursuant to Uniform Louisiana Local Rule 2.10M.

The Voters moved for expedited consideration of the case pursuant to FED. R. CIV. P. 57. The district court granted the motion for expedited consideration, heard argument on the cross-motions for summary judgment on October 23, 1995, and took the case under advisement.

On April 11, 1996 the district court entered summary judgment in favor of the State. In a one-paragraph discussion of the merits, the ruling stated:

> This matter is before the Court on cross motions for summary judgment. After reviewing the record, the Court finds that there are no genuine issues of material fact, and that the defendants are entitled to judgment as a matter of law. The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States.

J.A. 48. The same day the district court entered a separate final judgment in the State's favor. J.A. 47.

After learning of the district court's decision on April 23, 1996, the Voters filed their notice of appeal in the district court the next day. On April 25, 1996, the Voters filed an emergency motion for expedited appeal, which the United States Court of Appeals for the Fifth Circuit granted on April 26, 1996. Under the expedited briefing and argument schedule ordered by the court of appeals, argument was held on July 8, 1996.

On July 30, 1996, a divided panel of the court of appeals reversed the district court and issued a declaratory judgment "that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1 and 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." *Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996). J.A. 60. The court of appeals declined, however, to award any immediate injunctive relief because of the disruptive effect such an injunction would have had on Louisiana's then-impending 1996 congressional elections, and remanded the case to the district court with instructions to consider injunctive relief if the Louisiana Legislature did not act to correct the problem in its 1997 session. *Id.* at 1031-32. J.A. 60-61.

On August 13, 1996, the State filed a suggestion for rehearing en banc in the court of appeals. Under 5TH CIR. R. 35.6 (Internal Operating Procedure accompanying Rule), a suggestion for rehearing en banc is also treated as a petition for panel rehearing.

On October 28, 1996, the State filed a petition for writ of certiorari in this Court.

On November 15, 1996, the court of appeals denied the State's suggestion for rehearing en banc and petition for panel rehearing, with three members of the full court

dissenting from the denial of rehearing en banc. *Love v. Foster*, 100 F.3d 413 (5th Cir. 1996) (per curiam). J.A. 73. In response to the petition for panel rehearing, the panel stated that

> all we hold is that Louisiana's election plan, to the extent that it precludes any legal election for United States Representatives and Senators on federal election day, conflicts with 2 U.S.C. §§ 1 and 7, and is invalid. Also, we do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on federal election day and provide for a runoff election between November and January when the elected member of Congress takes office. *See* 2 U.S.C. § 8.

Id. at 413-14. J.A. 74.

On March 17, 1997, this Court granted the State's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

Louisiana law provides that its October congressional primary is a conclusive election if any candidate secures a majority of the votes cast in such primary. Federal law, however, requires that

congressional elections must occur on "the Tuesday next after the 1st Monday in November" (federal election day), 2 U.S.C. §§ 1, 7, and permits states to select another date for election only to the extent that there is a "failure to elect" on federal election day. 2 U.S.C. § 8. Because the timing of Louisiana's October congressional primary conflicts with the date mandated by 2 U.S.C. §§ 1 and 7, and because Congress has occupied the field of the timing of congressional elections (save for the narrow exceptions left to the states by 2 U.S.C. § 8), Louisiana law providing for the October congressional primary is preempted by 2 U.S.C. §§ 1 and 7.

ARGUMENT

I. FEDERAL LAW PREEMPTS LOUISIANA'S OCTOBER CONGRESSIONAL PRIMARY

A. Federal Law Requires That Congressional Elections Be Held on Federal Election Day in November

Article I, Section 4, Clause 1 of the United States Constitution states:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such

> Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1. The Framers fully understood that under this clause, Congress was given the power to establish "uniformity in the time of [congressional] elections." THE FEDERALIST No. 61 (Alexander Hamilton).[1] This principle was recently recognized by this Court in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842 (1995). *Compare id.* at 808-09, 115 S. Ct. at 1857 (the Framers created a safeguard against State abuse of Time, Place and Manner regulation by giving Congress power to make or alter same) *with id.* at 895, 115 S. Ct. at 1899 (Thomas, J., dissenting) ("Article I gives Congress the ultimate authority over the times, places and manner of holding congressional elections.").

Acting pursuant to this constitutional authority, in 1872 Congress enacted 2 U.S.C. § 7, which in its present form provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the

[1] Indeed, some of the Framers considered this power to establish a uniform date for congressional elections to be a "positive advantage." *Id. See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 894-95, 115 S. Ct. 1842, 1898 (1995) (Thomas, J., dissenting) (§ 4 was defended at the Pennsylvania ratifying convention on the ground that "congressional elections should be 'held on the same day throughout the United States, to prevent corruption or undue influence'") (citing 2 ELLIOT'S DEBATES 535 (J. Elliot ed. 1937)).

> States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Thus, the "Tuesday next after the 1st Monday in November" (federal election day) is the date established by Congress for elections of members of the House of Representatives in election years.

After the ratification of the Seventeenth Amendment (providing for the direct election of senators), Congress enacted 2 U.S.C. § 1, which in its present form states:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. § 1. By linking the election of U.S. Senators under this section with the election of U.S. Representatives, Congress plainly mandated that *all* elections for congressional representation be held on federal election day. Congress has further emphasized its goal of uniformity in the time of federal elections by

mandating that presidential electors be appointed "in each state" on federal election day. *See* 3 U.S.C. § 1.[2]

By mandating a uniform federal election day, Congress acted "to remedy more than one evil arising from the election of members of congress occurring at different times in the different states." *Ex parte Yarbrough*, 110 U.S. 651, 661, 4 S. Ct. 152, 157 (1884); *Busbee v. Smith*, 549 F. Supp. 494, 524 (D.D.C. 1982), *aff'd*, 459 U.S. 1166, 103 S. Ct. 809 (1983). Such evils included voting in an early election in one state and a later election in another state, CONG. GLOBE, 42d Cong., 2d Sess. 112-17 (1871), as well as unduly benefitting certain states and political parties and unnecessarily burdening voters with the requirement of voting in congressional elections and Presidential elections on different days in presidential election years. *Id. See also Busbee*, 549 F. Supp. at 524 (citing CONG. GLOBE, 42d Cong., 2d Sess. 141 (1871)). The principal congressional sponsor of Section 7, Representative Benjamin Butler, specifically sought to preclude "voting in October." *See* CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871).

Finally, in the same 1872 legislation enacting Section 7, Congress provided for the contingency of a failure to elect on federal election day:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a

[2] 3 U.S.C. § 1 provides: "The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President."

> vacancy, whether such vacancy is caused by *a failure to elect at the time prescribed by law*, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

2 U.S.C. § 8 (emphasis added). On its face, this provision is triggered only when an election on federal election day, the "time prescribed by law," results in "a failure to elect." If such a contingency occurs, the states may by law select a day *thereafter* to hold an election to fill the vacancy caused by the failure to elect on federal election day.[3]

In enacting Section 8, Congress fully anticipated that states with majority-vote requirements might experience a "failure to elect" on federal election day. During the consideration of the legislation providing for Sections 7 and 8, Senator Thurman explained that Section 8

> relates only to the case of a special election to fill a vacancy, *or where there is a failure to elect* [on federal election day]. It does not touch the general elections for members of the House of Representatives. The cases, therefore, to which it will apply are very rare indeed. It is very seldom that there is an election to fill a

[3] 2 U.S.C. § 8 applies equally to elections of U.S. Senators and U.S. Representatives. *Public Citizen v. Miller*, 813 F. Supp. 821, 829 n.8 (N.D. Ga. 1993), *aff'd*, 992 F.2d 1548 (11th Cir. 1993).

> vacancy, *and more seldom still that there is a failure to elect*. In all those States in which a plurality elects, no such thing as a failure to elect can occur unless there should be a tie, and in those cases I think in every State the right then is determined by lot . . . .
>
> I think, therefore, *there can be no failure to elect except in those States in which a majority of all the votes is necessary to elect a member, and they are very few in number*. Then there is no probability of there being a failure to elect so as to make this section necessary in many cases, and the vacancies that happen are very few indeed. The section itself, therefore, is rather inserted out of abundant caution than for any other reason.

CONG. GLOBE, 42d Cong., 2d Sess. 677 (1872) (remarks of Sen. Thurman) (emphasis added).

By its enactment of Section 7, Congress required all states, including those with majority vote requirements, to hold regular congressional elections on federal election day. Congress also anticipated that states with majority-vote requirements might experience a "failure to elect" on federal election day, and provided for this contingency in 2 U.S.C. § 8, which permits states to schedule post-federal election day run-off elections. *See Busbee*, 549 F. Supp. at 526 ("section 8 creates an exception to section 7's absolute rule in a limited class of cases"). *See also Public Citizen v. Miller*, 813 F. Supp. 821, 828-31 (N.D. Ga. 1993), *aff'd*, 992

F.2d 1548 (11th Cir. 1993) (upholding under Section 8 a post-federal election day run-off election of U.S. Senator necessitated by a failure to elect on federal election day). Thus, states with majority vote requirements can hold any necessary run-off election on a date subsequent to federal election day, so long as the initial attempt to elect is held on federal election day.

B. Louisiana Law Provides for Congressional Elections in October

Under Louisiana's election code, primaries for congressional and state offices are "open." All candidates, regardless of party affiliation, appear on the same ballot, and all voters, regardless of party affiliation, may vote in the open primary. *See* LA. R.S. § 18:401(B). With respect to congressional offices, Louisiana's election code provides that "primary elections shall be held on the first Saturday in October of an election year." LA. R.S. § 18:402(B)(1); *see also* LA. R.S. § 18:1272(A) (same).

By operation of LA. R.S. § 18:1271,[4] the following provision of the Louisiana election code applies to primary elections for U.S. Representative and U.S. Senator:

> Majority vote. A candidate who receives a majority of the votes cast for an office in a primary election *is elected*.

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[4] LA. R.S. § 18:1271 provides: "Except as otherwise specifically provided in this Part, United States senators and representatives in Congress shall be elected as provided in this Title for the election of public officers."

LA. R.S. § 18:511(A) (emphasis added). Thus, if a congressional candidate in the October primary secures a majority of the votes cast, that candidate "is elected" on that day, and no election for the congressional office is or can be held on federal election day: No candidate's name appears on the federal election day ballot, and no vote can be cast for the office on federal election day.

If there is a failure to elect in Louisiana's October congressional primary, that is, if no candidate secures a majority of the vote, Louisiana law provides for a run-off between the top two vote-getters in a so-called general election. *See* LA. R.S. § 18:481 ("the candidates who qualify for each office remaining to be filled in the general election are those who receive the two highest numbers of votes . . . *among those not elected in the primary election*") (emphasis added). When such a "general election" is necessitated by a failure to elect in the October primary, the general election is held on federal election day. *See* LA. R.S. § 18:402(B)(2); *see also* LA. R.S. § 18:1272(A) (same).

Generally speaking, "[a] primary election is simply a nominating device whose basic and fundamental purpose is the selection of candidates to be placed on the official ballot at a general election." 26 AM. JUR. 2D *Elections* § 228, at 42 (1996). This Court has recognized the distinction between primaries and general elections. Elections are the "final choice of an officer by the duly qualified electors," while primaries are "merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors." *Newberry v. U.S.*, 256 U.S. 232, 250, 41 S. Ct. 469, 472 (1921); *see also United States v. Classic*, 313 U.S. 299, 316-17, 61 S. Ct. 1031, 1038 (1941), *reh'g denied*, 314 U.S. 707, 62 S. Ct. 51 (1941) (noting the difference between one-step general election and two-step primary system where the first step, the primary, "is the choice . . .

of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election").

In Louisiana, however, the October congressional "primary" is not simply a nominating device to qualify candidates or to winnow down the number of candidates to be placed on the ballot at the general election. Instead, as Louisiana law expressly recognizes, the "purpose" of the Congressional primary is "to elect persons to Congress." LA. R.S. § 18:401(A).[5] As the Fifth Circuit observed in an earlier case involving Louisiana election laws, in Louisiana, "[a] general election is held for an office *only if no one is elected to it as a result of the primary election process*, and the only candidates appearing on the general election ballot are those who 'survived' the primary." *Dart v. Brown*, 717 F.2d 1491, 1495 (5th Cir. 1983), *cert. denied*, 469 U.S. 825, 105 S. Ct. 105 (1984) (emphasis added). Consequently, Louisiana's so-called "primary" is an "election" for purposes of 2 U.S.C. §§ 1 and 7 because it contemplates the conclusive election of congressional candidates that receive a majority of votes cast.[6]

The undisputed facts in the record reveal that over eighty percent of the time, Louisiana's October

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[5] LA. R.S. § 18:401(A) provides: "Purpose. Primary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector."

[6] While virtually all other states use primaries, open, partisan, or otherwise, to determine which candidates for U.S. Representative or U.S. Senator will appear on the ballot on federal election day, the Voters are unaware of any other state in the Union which permits *conclusive* congressional elections in advance of federal election day.

congressional primary accomplishes its stated purpose under LA. R.S. § 18:401(A) of "elect[ing] persons to Congress." Between 1978 (when the open primary system first took effect in congressional elections) and 1994, Louisiana held seventy regular elections for U.S. Representative, of which fifty-seven were contested (in that more than one candidate qualified to appear on the October open primary ballot).[7] J.A. 30, ¶¶ 7, 11. Louisiana has also held six regular elections for U.S. Senator, all of which were contested. J.A. 30, ¶ 12. Of the contested elections, only nine elections (15.8%) for U.S. Representative and one election (16.7%) for U.S. Senator were held on federal election day. J.A. 30, ¶¶ 11, 14. The remaining *forty-eight* elections for U.S. Representative and *five* elections for U.S. Senator — *more than eighty percent* of the total number of contested congressional elections — were held on and conclusively determined in Louisiana's October primary. J.A. 30, ¶¶ 11, 13.

The potentially (and as the record reveals, usually) conclusive character of Louisiana's congressional primary is precisely what transforms it from a mere qualifying or winnowing primary into an outright election for purposes

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[7] The remaining thirteen elections for U.S. Representative in Louisiana were uncontested, *i.e.*, only one candidate qualified to appear on the open primary ballot and was therefore declared "elected" pursuant to LA. R.S. § 18:511(B). The Voters do not dispute that where only *one* congressional candidate "qualifies," in the sense of timely filing the appropriate candidacy papers and otherwise meeting the relevant age and residence requirements, that candidate is indeed "unopposed" on the federal election day ballot; and the State is *not* required to place such candidate's name on the federal election day ballot.

of 2 U.S.C. §§ 1 and 7. Were Louisiana's open primary a true "qualifying" primary, it could never be conclusive as a matter of law: It would only winnow to no fewer than two the number of candidates who actually appeared on the federal election day ballot.[8]

In sum, the earliest date that Louisiana can schedule conclusive congressional elections is federal election day. Primary elections, open or otherwise, in advance of federal election day, that narrow the field of candidates who will ultimately appear on the federal election day ballot *are* permissible under 2 U.S.C. §§ 1 and 7 so long as such "primaries" are not conclusive *ipso jure*. Put another way, pre-federal election day "primaries" cannot prematurely end the contest for Congress by themselves. Because Louisiana's October congressional "primary" contemplates conclusive elections in advance of federal election day, the court of appeals correctly held that the October primary fails this test and clashes with 2 U.S.C. §§ 1 and 7.

As the court of appeals specifically noted, *see Love*, 100 F.3d at 413-14, J.A. 74, Louisiana may retain its existing open primary system for congressional elections by simply adjusting the relevant dates so that the primary, as a potentially conclusive election, is held on federal election

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[8] A winner of a true qualifying primary might permissibly be declared "elected" as "unopposed" for purposes of 2 U.S.C. §§ 1 and 7 if state law permitted other candidates to qualify, by other primaries or otherwise, for the federal election day ballot, and no other candidates opted to qualify. Under Louisiana's open primary regime, however, if a candidate secures a majority of the votes cast in the open primary, that candidate is elected and there is no November election.

day, and any necessary run-off election is held thereafter, as contemplated by 2 U.S.C. § 8. Thus, the State's argument that the decision of the court of appeals interferes with Louisiana's prerogative to determine the *manner* of its congressional elections is baseless. The Voters challenge the *timing* of Louisiana's congressional primary, not its manner.

C. Because Louisiana's Open Primary Law Conflicts with Federal Law, It Is Unconstitutional Under the Supremacy Clause and Must Yield.

The Supremacy Clause of the U.S. Constitution provides that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. As this Court's teachings make clear, "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128 (1981); *see also Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S. Ct. 258, 263 (1965) ("[I]f a state measure conflicts with a federal requirement, the state provision *must* give way.") (emphasis added).

"In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress." *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280, 107 S. Ct. 683, 689 (1987). When Congress enacted Section 7 into law, it delayed its operative effect until 1876 so that state election laws governing the timing of *state* elections could be aligned with the new federal date. In the words of Representative Butler, "The object of this amendment is to provide a uniform time of electing Representatives in

Congress, beginning with the elections for the Forty-Fourth Congress. My reason for putting it off till then is to allow some States time to change their constitutions. . . ." CONG. GLOBE, 42d Cong., 2d Sess. 112 (1871). As this legislative history makes clear, Congress intended to preempt state law as to the timing of congressional elections.

Furthermore, congressional intent to preempt may be inferred "where the state law at issue conflicts with federal law, . . . because the state law stands as an obstacle to the accomplishment and execution of congressional objectives." *Northwest Central Pipeline Corp. v. State Corp., Comm'n of Kansas*, 489 U.S. 493, 509, 109 S. Ct. 1262, 1273 (1989) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

Louisiana's October congressional primary clearly conflicts with 2 U.S.C. §§ 1 and 7. It ignores Section 7's mandate for elections on federal election day, replacing it with a binding election in October whenever a candidate secures a majority of the primary vote. This is precisely what the court of appeals held:

> We agree with [the Voters] that the Louisiana election system, as applied to elections for congressmen, conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters.

Love, 90 F.3d at 1031. J.A. 59. The court of appeals correctly concluded that because of Louisiana law's conflict with the federal statutes, Louisiana law must yield under the Supremacy Clause.

Congressional intent to preempt may also be inferred "where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Northwest Central Pipeline*, 489 U.S. at 509, 109 S. Ct. at 1273 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146 (1947). However, "[t]here is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field." *Kelly v. Washington*, 302 U.S. 1, 10, 58 S. Ct. 87, 92 (1937). *See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212-13, 103 S. Ct. 1713, 1726-27 (1983) (field preemption occurs when the federal government "completely occupies a given field *or an identifiable portion of it*") (emphasis added).

This Court has recognized that within the field of congressional elections, a state may act "to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under [Art. I] § 4 . . ." *Classic*, 313 U.S. at 315, 61 S. Ct. at 1037. Rather than enact legislation that occupies the entire field of the times, places and manner of congressional elections, Congress chose to regulate only an identifiable portion of such field, the timing of congressional elections. Nevertheless, Congress legislated very fully in that area. *See State v. Frear*, 142 Wis. 320, 125 N.W. 961, 970 (Wis. 1910) (finding Congress to have legislated "very fully" in enacting the federal election day statutes, and holding that "[s]uch legislation supersedes any state legislation covering the same subject-matter"). Congress, by enacting 2 U.S.C. §§ 1 and 7, preempted the field of the *timing* of congressional elections, save for the narrow exceptions under 2 U.S.C. § 8, which Congress left to the states.

Where, as here, Congress has occupied a given field or an identifiable portion of it, "the test of preemption is

whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Pacific Gas & Elec. Co.*, 461 U.S. at 213, 103 S. Ct. at 1727 (quoting *Rice*, 331 U.S. at 236, 67 S. Ct. at 1155). Because 2 U.S.C. §§ 1 and 7 regulate the timing of congressional elections, Louisiana law on the timing of congressional elections is preempted to the extent it does not fall within the area left to state control by 2 U.S.C. § 8. As Section 8 does not authorize Louisiana's October congressional primary, Louisiana law trespasses upon the field regulated by 2 U.S.C. §§ 1 and 7 and is preempted.

In sum, Louisiana's October congressional primary directly clashes with federal law because it allows for congressional elections on a date other than that prescribed by 2 U.S.C. §§ 1 and 7. Moreover, Congress has occupied the field of the timing of congressional elections, and Louisiana law providing for congressional elections in October encroaches that field. Thus, as the court of appeals correctly held, the Louisiana October congressional primary must yield under the Supremacy Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In The

Supreme Court of the United States

October Term, 1996

MURPHY J. FOSTER, JR., in his official capacity as Governor of Louisiana, and W. FOX MCKEITHEN, in his official capacity as Secretary of State of Louisiana,

Petitioners,

v.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Article I, Section 4, Clause 1 of the United States Constitution authorizes the states to prescribe the times, places and manner of holding elections for Congress unless Congress otherwise provides therefor. The parties in this matter agree that Congress, in enacting 2 U.S.C. §§ 1 and 7, sought to address the timing of congressional elections. The dispute here is whether Louisiana's change from a partisan primary to an open elections system changed the manner in which it conducts its elections (which all agree is not pre-empted by Congress) or the timing of its elections. An analysis of the laws in question indicates that Louisiana's change of election systems effected the manner, not the timing of its congressional elections.

I. Louisiana's enactment of its open elections system did not change the timing of its congressional elections.

Both the appellate court and the appellees concede that the elections system employed by Louisiana prior to 1978 satisfied the requirements of 2 U.S.C. §§ 1 and 7. *See*, J.A. 56, "Before 1978, Louisiana's election system for selection of representatives and senators complied with the federal election day statutes."; and *see also*, J.A. 78, "The plaintiffs concede that the traditional partisan state primary systems, such as Louisiana's pre-1978 system, do not actually conflict with or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."; and *compare*, J.A. 78, n. 3 and

J.A. 68, n. 1. Under that election scheme, partisan primaries were held for the purpose of selecting candidates to appear on the general election ballot. The general election was held subsequent to the partisan primaries on the date established by 2 U.S.C. §§ 1 and 7.

The appellees also concede that Congress, in enacting 2 U.S.C. §§ 1 and 7 did not attempt to regulate the manner in which states conduct their elections, but only the timing of the elections. [*See*, Respondents' Brief on the Merits, hereinafter "BR.", at 22.]

When the state of Louisiana changed its elections system from the partisan primary scheme to the present open elections system, the one change it did *not* make was to alter the *timing* of its general elections for Congress. Under the old scheme, the general elections were held on the first Tuesday following the first Monday in November, as required by 2 U.S.C. §§ 1 and 7. Under Louisiana's current law, the general election for Congress are held on that same day.

The purpose and effect of the enactment of Louisiana's current law was to change the *manner* in which candidates qualify for the general election, from a closed partisan primary to an open primary scheme in which all candidates, regardless of party affiliation, are placed on the ballot.

The appellees seek to refute that fact by arguing in their brief that Louisiana's primary elections are not "primaries" because in some instances one candidate emerges from the primary as the lone qualified candidate for the general election, and in such instance no contested general election occurs. They assert that Louisiana's open

elections system is invalid because "pre-election day 'primaries' cannot prematurely end the contest for Congress by themselves." [BR. at 21.]

This argument is contradicted by the appellees own assertions in the lower courts that Louisiana's prior elections system satisfied the requirements of 2 U.S.C. §§ 1 and 7. *See*, J.A. 78, n. 2 and n. 3. Under this prior system, the primary elections held prior to "federal election day" more often than not conclusively determined the candidate elected to Congress, so that often no contested congressional elections took place on the first Tuesday following the first Monday in November. *See*, J.A. 68, "Like its successor, the Louisiana party primary system that preceded the current open primary and general election system, more often than not failed to produce contested elections on the federal election day."; and *see also*, J.A. 68, n. 1.

The appellees, at footnote 6 of their brief, [BR. at 6] further contend that only Louisiana permits "conclusive" elections in advance of the 2 U.S.C. §§ 1 and 7 date. The contention substitutes fiction for reality. In any other state, if a candidate qualifies for a general election by a primary election and is ultimately unopposed in the general election, the primary election is, in effect, a "conclusive" election that determines the candidate elected to Congress. Other states may, or may not, place the name of unopposed candidates on the general election ballot, but whether the unopposed candidate is placed on the ballot or not does not change the fact that the primary election was the only contested election for the office he or she sought, and that it occurred before the 2 U.S.C. §§ 1 and 7 date. *See*, J.A. 68, n. 1.

The same "conclusiveness" can occur prior to the 2 U.S.C. §§ 1 and 7 date when only one candidate files the necessary qualifying papers for a particular seat. Under Louisiana law, that candidate is deemed elected upon the close of qualifying, well before the first Tuesday in November. Yet neither the appellees nor the appellate court found that provision of Louisiana's law objectionable. *See*, J.A. 78, n. 3, and BR. at 7, n. 7.

The appellees seek to attach some significance to the fact that Louisiana's "primary" election does not completely fit into the description of the term "primary" as stated by this court in *Newberry v. U.S.*, 256 U.S. 232 (1921). While it is admitted that Louisiana's primaries are not "methods by which *party adherents* agree upon candidates . . . for choice by all qualified electors" *Id.* at 250, (emphasis added), Louisiana's system is a method by which all of the electorate "winnow down the number of candidates to be placed on the ballot at the general election." [BR. at 19]. In some instances only one candidate survives the primary to qualify for the general election which is a direct result of the *manner* in which Louisiana determines the candidates eligible for the general election.

The appellees' attempt to "define" primaries in a partisan context reveals the fallacy of the appellees' argument and the appellate court's rationale. Both attach a special significance to partisan primaries, such that partisan primary elections systems resulting in uncontested congressional elections on the first Tuesday following the first Monday in November somehow satisfy the requirements of 2 U.S.C. §§ 1 and 7, while a non-partisan primary elections system that yields the same result, does

not. This gives clear indication that the real focus of the appellees and the appellate court is the *manner* of the election, not the timing.

Neither the statutory nor the legislative history of 2 U.S.C. §§ 1 and 7, suggest that Congress intended to preempt the states' ability to determine the manner in which candidate qualifying is conducted. Thus the states are free to establish the manner in which candidates qualify for the congressional elections to be held on the first Tuesday following the first Monday in November. There is also no indication that Congress intended to mandate that contested elections must always take place on the date established by 2 U.S.C. §§ 1 and 7, even if only one candidate has qualified for the election to be held on that date. Rather, 2 U.S.C. §§ 1 and 7 merely require that if more than one candidate has qualified for the general congressional election, that election must be held on that date.

Louisiana's law comports with that requirement. All congressional elections in which more than one candidate has qualified pursuant to Louisiana law are held on the first Tuesday following the first Monday in November.

II. The Federal and State laws at issue here should not be unreasonably interpreted so as to create a conflict between them.

The sparse legislative history of what is now 2 U.S.C. §§ 1 and 7 indicates that the intent of the legislation was to limit the number of trips voters must make to the polls, ("the poor laboring man who goes to the polls to vote looses his day's work") and to limit states and political

parties from obtaining undue advantage by conducting their elections at varying times. Cong. Globe 42d Congress, 2d Session 141 (1871). There is absolutely no indication that Congress intended to limit the States' ability to decide the manner in which candidates are to qualify for the general election held on the date established by 2 U.S.C. §§ 1 and 7, or that Congress intended that general elections for Congress must always be contested.

As discussed in appellants' original brief, Louisiana's open elections system comports with the intent of the federal statutes better than most states, by limiting the maximum number of trips to the polls to two, and by holding the primary election closer to the general election date than do other states. There is no need to give the federal statutes the unreasonable interpretation placed upon it by the appellate court and appellees, so as to create a conflict, when Louisiana's law comports fully with a reasonable interpretation of the laws at issue.

The appellees, throughout the district court and appellate court proceedings, asserted that the courts should throw out Louisiana's current system and reinstitute the previous partisan primary system. *See*, J.A. 59, "Respondents contend that this court should declare the 1978 Louisiana election code invalid and reinstate the pre-1978 election law." In their brief to this court, the appellees for the first time adopt the appellate court's suggested remedy. That Louisiana need only move the dates of its primary and general elections so that the primary election be held on the 2 U.S.C. §§ 1 and 7 date, and the general election held subsequent to that date. *See*, J.A. 74.

Neither "remedy" suggested by appellees satisfies the goals of the federal legislation to any greater extent than does the present law. In fact, reversion to the partisan primary system will require *more* trips to the polls, and primary elections held earlier in the year than the present open primary. Nor will moving the date of the elections to later in the year decrease the number of trips the voters will make to the polls, or alleviate any known or perceived advantage or disadvantage to any political parties or the state. In fact, neither the appellees nor the appellate court has articulated or even implied that any of the "evils" discussed in the legislative history have occurred as a result of Louisiana's current open elections system.

The Supremacy Clause, Article V, Clause 2 of the United States Constitution, operates to invalidate or otherwise render unenforceable state laws that conflict with federal laws on the same subject. Here, however, a conflict exists between the federal and state law only if the federal law is given an unreasonable and unnecessary interpretation. The appellate court improperly interpreted 2 U.S.C. §§ 1 and 7 and therefore erred in finding that 2 U.S.C. §§ 1 and 7, was in conflict with Louisiana's open elections system when utilized for Congressional elections.

CONCLUSION

The Louisiana open elections system, establishing the manner in which Louisiana elects its members to Congress, does not conflict with the provisions of 2 U.S.C.

§§ 1 and 7 establishing the timing of the Congressional elections. The decision of the United States Court of Appeals for the Fifth Circuit invalidating Louisiana's open elections system should be reversed.

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